Supreme Court, U.S.
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No. 90-68

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

EDDIE S. YLST, WARDEN

Petitioner,

v.

OWEN DUANE NUNNEMAKER

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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Petition for Certiorari Filed July 9, 1990
Certiorari Granted November 5, 1990

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RELEVANT DOCKET ENTRIES

DATE	DOCKET ENTRIES
March 15, 1976	Respondent sentenced to life imprisonment for first degree murder
June 30, 1978	California Court of Appeal affirmed the judgment of conviction (as modified)
September 27, 1978	California Supreme Court denies petition for hearing
December 3, 1986	California Supreme Court denies petition for writ of habeas corpus
September 8, 1987	United States District Court dismisses petition for writ of habeas corpus
December 8, 1987	United States District Court dismisses petition for writ of habeas corpus
April 7, 1988	California Supreme Court denies petition for writ of habeas corpus
December 9, 1988	United States District Court denies petition for writ of habeas corpus

DATE	DOCKET ENTRIES
May 25, 1990	United States Court of Appeals affirms in part and reverses in part the judgment of the District Court

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent, vs. OWEN DUANE NUNNEMAKER, Defendant and Appellant.	1 Criminal 15379 (Super. Ct No. 7869-C)

Defendant, Owen Duane Nunnemaker, was tried by a jury on an information charging him with the murder of his wife, Alice (count one); assault with a deadly weapon (Pen. Code, § 245, subd. (a)) (count two), and a violation of former Penal Code sections 12022.5 (use of a firearm), 3024, subdivision (a), and 12022 (armed with a deadly weapon).[1/] The jury returned a guilty

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1. Section 3024 was repealed by statutes of 1976, chapter 1139, section 279; sections 12022 and 12022.5 were amended by statutes of 1976, chapter 1139, sections 304-305, and by statutes of 1977, chapter 1. 5,

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verdict of first-degree murder (Pen. Code, § 187), and found that the enhancement allegations were true.[2/] On appeal from the judgment entered on the verdict, defendant raises several claims of errors. We have examined the entire cause, including the evidence, and determine that only one of his claims is meritorious; accordingly, we modify the judgment of conviction and - as so modified - affirm the judgment. We discuss each claim ad seriatim.

Facts

In the afternoon of May 31, 1975, defendant - armed with an automatic weapon - forcibly entered the home of his estranged wife, Alice, and following a struggle fired a single shot from a distance of three feet mortally wounding the victim. As witnesses to the shooting attempted to assist the fallen victim, the defendant restrained them from summoning aid and cut the telephone cord preventing its use to call an

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sections 91-92.

2. A not guilty verdict was returned on count two.

ambulance. One of the foster children,[3/] Linda (age 16 years), managed to exit the home and called the sheriff's office on a neighbor's telephone. When the officers arrived, Linda informed them of the shooting. After all but one of the children had exited, the officers entered the home and observed the victim lying on the floor of the living room and another foster child, Sherry (age 17 years), at her side. During their search, they discovered the defendant in a rear bedroom where apparently he had just telephoned the sheriff's office requesting an ambulance. Defendant offered no resistance and was placed under arrest and searched; several rounds of 9 millimeter ammunition were found in defendant's pocket; defendant led the officers to his car parked in

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3. For several years defendant and his wife had maintained their Sebastopol family residence as a licensed foster child placement facility. On the day of the shooting, four foster children (ranging in age from 7 to 17 years), the three pre-teenage Nunnemaker children, and a family friend, Mrs. Mickey Brower and her son, were present in the Nunnemaker residence. Mr. Adrian Turner, a foster child counselor, also resided there but was not present.

front of the house where they observed the weapon used[4/] lying on the front seat.

At trial, Linda, Sherry, and Mrs. Brower testified that the defendant appeared sober and calm immediately after the shooting; the three arresting officers gave similar testimony concerning their observations of defendant at the time of his arrest.

The defendant testified that he went to the home for the purpose of delivering a birthday present and to visit his children, which permission was refused by the victim. That as he and the victim were standing at the door, the victim suddenly "launched herself toward me." Thereafter, he could not recall any of the ensuing events until he walked to his car with his son Shawn and gave him the birthday present; he then noticed he was holding a gun in his hand which he placed in his car. Upon reentering the house, and thereafter seeing his

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4. It was stipulated at trial that the 9 millimeter German Luger pistol, retrieved from defendant's automobile in the course of a warranted search, was the actual death weapon.

wife lying on the floor, he telephoned the sheriff's office from the rear bedroom. Defendant denied that he had intentionally shot his wife whom he loved deeply.

The defense introduced psychiatric testimony in support of a diminished capacity defense; on rebuttal, the prosecution presented conflicting psychiatric testimony.

I. Insufficiency of the Evidence

Defendant contends that there was no substantial evidence presented during trial to support the jury's implied finding of premeditation, deliberation and willfulness, or malice, warranting at a minimum that the judgment be modified to a lesser conviction or degree of crime (Pen. Code, § 1181, subd. 6). Relying on a series of decisions where such remedial procedure was invoked (People v. Bassett (1968) 69 Cal.2d 122; People v. Anderson (1968) 70 Cal.2d 15; and People v. Wolff (1964) 61 Cal.2d 795) defendant argues that in light of the whole record there was no reasonable, credible and solid evidence presented to justify the jury's implied

findings of the requisite mental states. Additionally, focusing on certain evidence introduced by the prosecution, he argues that the permissible inference of innocence based upon such evidence is binding upon the People as establishing a reasonable hypothesis of innocence of first-degree murder. (See People v. Estrada (1923) 60 Cal.App. 477.)[5] Our review of the whole record and the evidence adduced leads to our conclusion that defendant's contentions have no merit.

Malice is express when there is manifested a deliberate intention unlawfully to kill a human being (People v. Wolff, supra, 61 Cal.2d 795, 819-820; Pen. Code, § 188) and implied where "'the killing proximately resulted from an act, the natural consequences of which are dangerous to life, which act was deliberately

5. His principal reliance is placed upon evidence of defendant's intoxication when he made certain damaging admissions both before and at the time of the shooting, the evidence surrounding the struggle between defendant and the victim immediately before the shooting, the defective safety mechanism on the death weapon, and observations by an independent witness that defendant had acted "crazy" earlier that morning.

performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.'" (People v. Mattison (1971) 4 Cal.3d 177, 182-183; People v. Phillips (1966) 64 Cal.2d 574, 587.) Malice will be presumed when it is proven that the killing was committed by the defendant and nothing more need be shown. (People v. Conley (1966) 64 Cal.2d 310, 320.) Viewing the record in a light favorable to the People (People v. Reilly (1970) 3 Cal.3d 421, 425), the evidence that defendant went to the victim's home where - following a struggle - he forcibly gained entrance, thereafter pulled out the weapon and from a distance of a few feet, took deliberate aim and shot the victim, is not only sufficient to support a presumption of malice but is also sufficient to support an inference of express malice. (People v. Williams (1969) 71 Cal.2d 614, 624.)

Defendant argues that the psychiatric testimony produced in his behalf constituted substantial evidence negating his ability to harbor malice; additionally, that

the conflicting psychiatric testimony produced by the prosection was legally insubstantial and thus a conviction of murder on such evidence cannot be sustained. Defendant is mistaken. It is well established that "'"[i]f the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.'" [Citations.] The test on appeal is whether substantial evidence supports the conclusion of the trier of fact, . . . [and] [t]he appellate court must determine whether a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt. [Citations.]" (People v. Reilly, supra, 3 Cal.3d 421, 425.) And, under certain circumstances, the jury may even properly reject uncontradicted psychiatric testimony. (People v. Coogler (1969) 71 Cal.2d 153, 166 [cert. den. 405 U.S. 971].) "'The chief value of an expert's testimony in this [mental illness] field, as in all other

fields, rests upon the material from which his opinion is fashioned and the reasoning by which he progresses from his material to his conclusion; . . .' [Citation.]" (People v. Bassett, supra, 69 Cal.2d 122, 141.) Herein, while defendant's expert testified that the defendant had acted without malice, he also conceded the possibility that the defendant intended to kill his wife. Moreover, the prosecution's expert who had conducted an independent examination of the defendant (cf. People v. Bassett, supra, where the prosecution's psychiatric testimony was based upon hypothetical questions alone) found similar psychiatric symptoms which in his opinion did not evidence a mental illness of such a serious nature as to preclude the ability to form the requisite state of malice. Such evidence, substantial in nature, was sufficient to support the jury's implied finding of malice which must be accepted on appeal. (People v. Reilly, supra, 3 Cal.3d 421; People v. Redmond (1969) 71 Cal.2d 745; see also People v. Anderson, supra, 70 Cal.2d 15; People v. Bassett, supra, at p. 139.) Nor is a

contrary conclusion compelled by reason of the conflicting testimony given by Linda and Sherry as to whether the fatal shot occurred accidentally during the struggle or as a result of a deliberate act following that initial altercation, since it is for the jury in the final analysis to determine the effect and value of the evidence, including impeachment. (See Evid. Code, §§ 312, 780; People v. Muir (1966) 244 Cal.App.2d 598, 601.) Accordingly, we find defendant's contention to be without merit.

Defendant further contends that the record is barren of any solid evidence to support the finding of premeditation, deliberation and willfulness necessary to sustain a first-degree murder conviction. With emphasis on the language of our Supreme Court in People v. Anderson, supra, 70 Cal.2d 15, he argues none of the evidence falls within any of the three classifications identified in Anderson essential to support an inference of the necessary mental states underlying a first-degree

murder conviction. For the reasons which follow, we find this contention likewise unpersuasive.

As correctly stated by the People, the controlling test is "the ability of the defendant to maturely and meaningfully contemplate the gravity of his intended act." (People v. Sedeno (1974) 10 Cal.3d 703, 713.) While the statutory definition requires "'substantially more reflection than may be involved in the mere formation of a specific intent to kill . . . [¶] [t]he true test is not the duration of time as much as it is the extent of the reflection.'" (People v. Wolff, supra, 61 Cal.2d 795, 821.) In People v. Anderson, supra, 70 Cal.2d 15, the Supreme Court delineated three types of evidence which, singly or collectively, are necessary to sustain a finding of premeditation and deliberation: (1) planning activity directed to and explainable as intended to result in the killing; (2) prior relationship and/or conduct supporting an inference of evil motive; (3) and the manner of killing itself. Unlike the factual circumstances reflected in the cases reviewed in

Anderson, the record herein demonstrates sufficient evidence of premeditation and deliberation under any of the Anderson topologies. Prior to the actual killing defendant armed himself with a pistol and extra ammunition, openly stated he was going to put "a couple more notches" on his pistol, proceeded to his wife's residence where he forcibly gained entrance after a brief struggle and then delivered the fatal shot at pointblank range. Such evidence amply supports an inference that he had soberly reflected upon his contemplated act and formed an intent to kill his wife well before he arrived at her residence. The forcible entry and deliberate discharge of his pistol may be readily reconciled with a theory of a preconceived plan consummated after mature reflection. (Cf. People v. Hillery (1965) 62 Cal. 2d 692 [cert. den. 386 U.S. 938; rehg. den. 386 U.S. 1000]; People v. Kemp (1961) 55 Cal.2d 458 [cert. den. 368 U.S. 932].) The evidence of motive tending to establish preexisting reflection (Anderson at p. 27) was even more compelling; not only

was it established that defendant had sometime earlier threatened to "blow her [his wife's] head off with a shotgun," but at the time of the killing the separation and pending divorce had deprived him of a substantial part of his income as well as access to his children. Moreover, his stated belief that his wife was engaged in a meretricious relationship with Turner contradicted his professed affection towards her from which the jury could reasonably conclude that defendant, angered and embittered, was motivated to deliberately and intentionally kill his wife. The act of intentionally firing the pistol from close range into the victim's chest strongly supports an inference of premeditation. Unlike People v. Anderson, supra, 70 Cal.2d 15, 21 (involving multiple random stabbing upon the victim's body), the evidence here disclosed a single, well-placed lethal shot fired from a distance of approximately three feet. (Cf. People v. Hillery, supra, 62 Cal.2d 692.) Although testimony was presented supporting defendant's version of an accidental shooting during the struggle (including

evidence of the defective safety mechanism on the Luger), such conflicting evidence related to a disputed question of fact for resolution by the jury. Clearly, the jury rejected a theory of accidental shooting in concluding that the killing was intentional. Where, as here, that determination is based upon substantial evidence, the jury's finding may not be disturbed. (People v. Reilly, supra, 3 Cal.3d 421; People v. Redmond, supra, 71 Cal.2d 745.)

Our review of the whole record reveals an aggregate of substantial evidence more than adequate to support an inference that the defendant was mentally capable to meaningfully reflect upon the gravity of his act and upon which the jury could reasonably base its implied findings of willfulness, premeditation, deliberation, and malice. (See People v. Anderson, supra, 70 Cal.2d 15.) Such findings must be accepted on appeal. (People v. Reilly, supra, 3 Cal.3d 421; People v. Redmond, supra, 71 Cal.2d 745.)

II. Miranda Error

Defendant further contends that prejudicial error was committed in allowing the testimony of the prosecution psychiatrist, Dr. Lowe, because he had not been advised of his Miranda rights (Miranda v. Arizona (1966) 384 U.S. 436) prior to the psychiatric interview; in addition, that the failure of his trial counsel to object to such testimony on Miranda grounds should not be considered on the issue of waiver. Defendant's contentions have no merit.

While it is generally established that Miranda principles apply to custodial interrogation of a defendant by a prosecution psychiatrist (People v. Bennett (1976) 58 Cal.App.3d 230, 236-237 and fn. 3) an objection based upon a Miranda violation cannot be raised for the first time on appeal. (People v. Bennett (1976) 60 Cal.App.3d 112, 116; In re Dennis M. (1969) 70 Cal.2d 444, 461-462.) Although the record is silent as to whether defendant was timely advised of such rights, the failure to interpose an objection during trial precludes

our consideration on appeal. (People v. Bennett, supra, 60 Cal.App.3d 112, 116-117.)

Inferentially, defendant claims that the failure of his trial counsel to object effectively deprived him of a meaningful defense of diminished capacity in that the introduction of the prosecutor's psychiatric testimony conflicted with that of the defense. His argument is unsound. In order to successfully assert a claim of ineffective counsel, defendant has the burden of establishing such incompetence. (People v. Camden (1976) 16 Cal.3d 808, 816-817; People v. Martinez (1975) 14 Cal.3d 533, 538) as demonstrable reality (People v. Stephenson (1974) 10 Cal.3d 652, 661.) Under such governing principles, the record must establish that counsel was either ignorant of the facts or the law resulting in a withdrawal of a crucial defense that reduced the trial to a farce and a sham. (People v. Martinez, supra, at p. 538.) Absence such affirmative showing, defendant is entitled to no relief. (People v. Jenkins (1975) 13 Cal.3d 749, 754-755 [cert. den. 423

U.S. 860].) Defendant has failed to make the requisite showing. Moreover, we cannot say that counsel's failure to object was not motivated by reasons of trial strategy or tactics. Defense counsel could readily have concluded that a tactical advantage could be gained through cross-examination of the expert witness revealing bias, the limited basis of his opinion and forensic experience in homicide cases. Failure to such assumed tactics does not demonstrate ineffectiveness and a party may not be permitted ""to gamble on a favorable decision and then raise such an objection in the event he is disappointed in the result.'" [Citation.]" (People v. Tappan (1968) 266 Cal.App.2d 812, 817.) Similarly, we see no merit in defendant's disjointed claim of involuntariness of his statements during the questioned psychiatric interview, in the absence of any objection based upon such grounds. Defendant fails to direct our attention to the relevant portion of the record (see Cal. Rules of Court, rule 15(a)), nor has our

examination thereof disclosed such an objection. We find no error herein.

III. Prosecutorial Misconduct

Defendant further complains of prejudicial misconduct committed by the prosecutor and his "advocate" in engaging in a "McCarthy-type" attach maligning his character and motives in order to depict him as a "bad guy" in the eyes of the jury. We have examined each of these claims and find them to be without merit.

To sustain a charge of misconduct it must be unequivocally demonstrated that the conduct involved a dishonest act or an attempt to persuade the court or jury by use of deceptive or reprehensible methods. (People v. Strickland (1974) 11 Cal.3d 946, 955; People v. Beivelman (1968) 70 Cal.2d 60, 75 [cert. den. 406 U.S. 971].) We first observe that none of the claimed acts of misconduct were objected to at trial; generally, a failure to raise such timely objection forecloses consideration of such misconduct on appeal. (See

People v. Jenkins (1974) 40 Cal.App.3d 1054, 1057; People v. Asta (1967) 251 Cal.App.2d 64, 87; and People v. Ney (1965) 238 Cal.App.2d 785, 790.) The record demonstrates that, with one exception (a leading question), defendant both failed to object to the cited instances or request an assignment of misconduct or curative admonition. Nonetheless, defendant urges that his failure to object may be excused when the case is "closely balanced . . . [and] the misconduct contributed materially to the verdict or unless the harmful results . . . could not have been obviated by a timely admonition to the jury." (People v. Varnum (1969) 70 Cal.2d 480, 488 [cert. den. 406 U.S. 971]; People v. Ney, supra, at p. 790.) The record does not support defendant's assertion in order to base a claim of waiver. The questioned conduct related to certain statements made by the prosecutor during opening statement and closing argument in which the defendant was characterized as a lazy inebriated who enslaved his wife to his every bidding, and that he had stated during the telephone

call to the sheriff's office that he had shot his wife. The prosecutor's statements reflecting upon defendant personally were clearly relevant to the issue of motive on the part of the defendant. (See People v. Clifton (1967) 248 Cal.App.2d 126, 133.) While the tape recording of the subject telephone call indicates that defendant did not make the statement attributed, the actual tape recording was played before the jury several times so that they could not possibly have been misled by the prosecutor's mistaken recollection of the substance of that call; indeed, the defendant himself testified that he believed he had made that admission on that occasion. In any event, there was independent evidence that defendant did shoot his wife. The testimony[6/] by Dr. Lowe (characterized as the

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6. - The actual testimony complained of, as underscored, is reported as follows:
"Q [By defense counsel] I will rephrase it.
"A Taking that into consideration --
"Q I mean taking all of those things that he is an intelligent man and all of the other things into consideration, you wouldn't expect a man of his intelligence, that everybody has testified to, to go over there with the intent to kill his wife, would you?

prosecutor's "advocate"), elicited in response to defense counsel's question, was relevant for the limited purpose of establishing matters upon which he relied in forming his expert opinion. (See Evidence Code, section 801. subd. (b); Witkin, Cal. Evidence (2d ed. 1966) section 410, p. 368.) No "misconduct" by the witness is manifested. Defendant's remaining claim of "unethical conduct," unsupported by the record, is determined to be groundless.

IV. Jury Instructions

Defendant next contends that the jury instructions on intoxication as related to the defense of diminished capacity were incomplete and failed to adequately

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"A <u>There is some evidence that I don't know whether it has been introduced into court or not, into this trial, that indicated at one point that he said, you know, if she leaves me, I will.</u>
"Q No, that's not been in here, no, no.
"A No. Okay, okay, that's --
"Q That's why Mr. Gallagher [the prosecutor] didn't bring it in. Taking those things into consideration, you wouldn't expect him to go over there with the intent to kill, would you?
"A I don't know. I cannot say.

distinguish the significance of evidence of voluntary intoxication bearing upon that defense from that involved in the general intent crime charged in count two. Our examination of the challenged instructions reveals the contention to be specious. The jury was properly instructed on all of the essential elements of the murder charge and on the effect of intoxication relevant to the defense of diminished capacity and the lesser included offenses of voluntary and involuntary manslaughter.[7] Moreover, in giving CALJIC instruction No. 4.20 (voluntary intoxication not a defense to a general intent crime) the court expressly limited that instruction to the aggravated assault charge contained in count two, of which defendant was ultimately acquitted. Defendant's companion argument that the court was obliged to give a "particularized" instruction regarding the defendant's level of intoxication is unsound. Since the court gave the required instructions concerning

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7. - The instructions given included standard CALJIC Instructions Nos. 4.21, 4.30, 8.41, 8.47 and 8.77 (CALJIC 3d ed.).

circumstantial evidence (CALJIC Nos. 2.00-2.02 (CALJIC 3d ed.)), as conceded by defendant, no further instructions were required or appropriate, particularly in the absence of any request by the defendant. (See generally People v. Rocha (1978) 80 Cal.App.3d 972, 980, and authorities there collected.) We find no error here.

V. Enhanced Punishment

Relying on People v. Bennett, supra 60 Cal.App.3d 112, defendant argues that the enhanced punishment based upon the jury findings made under the provisions of Penal Code section 3024, subdivision (a), and 12022 may not stand.

Our Supreme Court held in People v. Walker (1976) 18 Cal.ed 232, 243-244, that a finding pursuant to Penal Code section 12022.5, is of no legal effect in a case involving a sentence of life imprisonment upon conviction of the basic crime in which a firearm was used. "Defendant would thereby be sentenced to life imprisonment plus a consecutive term of five years to

life, providing a prison sentence theoretically extending beyond death." (P. 243.) The facts of the case at bench fall squarely within the prohibition of Walker; accordingly, any additional punishment imposed pursuant to said finding is invalid and must be stricken. Similarly, the punishment pursuant to Penal Code section 12022 can have no effect since it, too, would subject defendant to prison sentence beyond death.[8/] The enhancement imposed pursuant to section 12022 must also be stricken.[9/]

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8. - The language and legislative intent of former section 12022 are substantially similar to those of section 12022.5 in providing for an additional punishment of at least five years' imprisonment. (See People v. Walker, supra, 18 Cal.3d 232, 241; People v. Chambers (1972) 7 Cal.3d 666, 671-672.)

9. - We recognize that former section 3024, subdivision (a), imposed a minimum term of imprisonment of two years. Since defendant is already subject to a minimum term of incarceration of seven years based on his life sentence (Pen. Code § 3046), the finding under section 3024, subd. (a), can serve no purpose for enhanced punishment. However, we note that the finding that defendant was armed at the time of the offense could have some future consequence. (See, e.g., Pen. Code, § 1203.06, subdivision (a)(1).) Therefore, we decline to strike the finding that

The superior court will modify the judgment, and abstract of judgment and commitment to state prison, by striking therefrom the punishment imposed pursuant to Penal Code sections 12022 and 12022.5; as so modified, the judgment is affirmed.

Racanelli, P.J.

WE CONCUR:

Elkington, J.

Low, J.[**********/]

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defendant was armed within the meaning of section 3024, subdivision (a).

**********. Assigned by the Chairperson of the Judicial Council.

CLERK'S OFFICE. SUPREME COURT
4250 STATE BUILDING

San Francisco, California 94102
SEPTEMBER 27, 1978

I have this day filed Order

HEARING DENIED

In re: 1 Crim. *No.* 15379

People

vs.

Nunnemaker

Respectfully

G.E. Bishel
Clerk

SUPREME COURT COPY

CRIM. 25449
Supreme Court Filed: May 22, 1986
Laurence P. Gill, Clerk

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

PETITION FOR WRIT OF HABEAS

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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

OWEN DUANE (NUNNEMAKER)

Petitioner,

-vs-

SUPERIOR COURT OF THE
COUNTY OF SONOMA AND
THE CALIFORNIA DEPARTMENT
OF CORRECTIONS,

Respondent, Case No. _____

_____/

THE PEOPLE OF THE STATE
OF CALIFORNIA

Real Party in Interest.

_____/

PETITION FOR WRIT OF HABEAS CORPUS

Owen Duane Nunnemaker
B-72101
P.O. Box 2000 H-149
Vacaville, California 95696

IN THE SUPREME COURT

IN AND FOR THE STATE OF CALIFORNIA

IN THE MATTER OF:	
OWEN DUANE NUNNEMAKER,	Case No. _____
Petitioner,	(Sonoma County Case No. 7869-C)
ON HABEAS CORPUS.	

PETITION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE ROSE BIRD, CHIEF JUSTICE AND ALL ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT, THIS PETITION OF OWEN DUANE NUNNEMAKER, RESPECTFULLY ALLEGES:

STATEMENT OF THE CASE

By an information filed August 21, 1975, petitioner was charged with murder, in violation of Penal Code, section 187, and assault with a deadly weapon, in violation of Penal Code, section 245(a). It was further alleged that during the (commission) of the aforementioned offense, petitioner was armed with and

did use a firearm, in violation of Penal Code, section 12022 and 12022.5 (CT 12-13).[1]

The matter was placed before a trial by jury on the 13th of January, 1976 (CT 43). There is still an unanswered question as to proper arraignment, in that petitioner was held beyond 48 hours in violation of Penal Code, section 825.

On the 30th day of January, 1976, the jury returned guilty verdicts on first degree murder in violation of Penal Code, section 187. In addition, the jury found that petitioner was armed with and did use a deadly weapon, in violation of Penal Code, section 12022 and 12022.5. As to the charge of assault with a deadly weapon in violation of Penal Code, section 245(a), petitioner was found not guilty. (CT 61.)

On March 15, 1976, petitioner was sentenced to State Prison for a term of Life, plus enhancements.

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1. Herein the words Reporters Transcripts will be cited at "RT"; with the words Clerk Transcript cited as "CT".

A timely notice of appeal was filed on March 23, 1976. With the conviction being affirmed in part on June 30, 1978. The Appellate Court cited People-vs-Bennett, supra 60 Cal.App.3d 112 and People-vs-Walker (1976) 18 Cal.3d 232, 243-244, stating that a finding pursuant to Penal Code, section 12022 and 12022.5 must be stricken.

A timely notice of appeal was filed on March 23, 1976. With the conviction being affirmed in part on June 30, 1978. The Appellate Court cited People-vs-Bennett, supra 60 Cal.App.3d 112 and People-vs-Walker (1976) 18 Cal.3d 232, 243-244, stating that a finding pursuant to Penal Code, section 12022 and 12022.5 must be stricken.

The First Appellate Division stated that except for the modification (the removal of the enhancements) the conviction was affirmed.

STATEMENT OF FACTS

On May 31, 1975, it is alleged that petitioner shot his wife to death. It was learned that Mr. Nunnemaker

and his wife Alice maintained a home for foster children on Bloomfield Road in Sebastopol, California. At the time of the alleged shooting there were four children in the home, ranging from seven to seventeen and the Nunnemaker's own three children, who were three, four and six years of age (I RT 9-14.)[2/]

It was adduced that Mrs. Nunnemaker left the house with the children to assist a Mrs. Brower in a change of residence (I RT 28-30; II RT 13-18). There was testimony that indicated once Mrs. Nunnemaker returned home that she and Mr. Nunnemaker engaged in an argument that lasted six hours and ended when Mr. Nunnemaker fell asleep (I RT 31-32; II RT 18-21, 163-76).

As a result of this argument, Mrs. Nunnemaker took the children from the house and went to her

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2. The four volumes containing the testimony adduced at trial are not found to be consecutively paginated. Therefore, the transcripts of the proceedings of January 19 and 26, 1976 is designated "I RT"; the two transcripts of January 20-22 and 29, 1976 are designated "II RT" and "III RT"; the transcript of January 27, 1976 is designated "IV RT."

mother's residence in Ukiah for the next two days (I RT 33; II RT 20-22). Petitioner was not home when they returned to their home (II RT 22). Mrs. Nunnemaker made the decision that perhaps they should end their marriage and stated that she was going to begin divorce proceeding (I RT 166; III RT 377-78).

Petitioner left the home on Bloomfield Road and returned often to visit the children. During this time, Adrian Turner moved into the home on Bloomfield Road to serve as a counselor for the foster children (I RT 35; II RT 169-70).

On the afternoon on May 31, 1975, petitioner drove to the family home. In the house when he arrived were Mrs. Nunnemaker, their children, Shawn, Victor, and Vandy; also present were the foster children, Linda Rivera, Sherry Thomas, Raymond Mead and Dornie Schultz and Mickey Brower and her son (I RT 41; II RT 26). Sherry heard the doorbell ring and saw Mrs. Nunnemaker go to the door. Sherry testified that she

heard Mrs. Nunnemaker say, "Please leave Slim" (I RT 43-44). [Slim was a nickname of petitioner (I RT 9).]

Mr. and Mrs. Nunnemaker left the doorway and entered the living room. There was testimony that a struggle took place. It was also adduced that Mr. Nunnemaker said, "you won't let me see my kids." (I RT 45.)

A weapon was then seen. A single shot was discharged and Mrs. Nunnemaker fell to the floor. (I RT 51.)

DEFENSE

Petitioner set forth to establish that there was neither malice or premeditation in the shooting death of his wife. He testified that in 1964 he injured his back in a fall from a ladder and underwent surgery to repair a ruptured disc. As a result of the injury, he was unable to work. He was under constant pain and disliked the medicines prescribed because they often left him intoxicated and unable to perform simple tasks.

Petitioner's disability did not prevent his speculation in the stock market, an enterprise at which he was successful (I RT 151; IV RT 82). Since the opening of the "home" for the emotionally disturbed children, which he and Mrs. Nunnemaker agreed together to operate, the couple purchased a home and obtained the necessary license. Still disabled, petitioner did light maintenance work and watched the children when Mrs. Nunnemaker was not at home. (1 RT 147-50). Additionally, he took the children on trips which he tried to make educational as well as entertaining. (I Rt 155-A).

It should be noted that Mr. and Mrs. Nunnemaker had been married for thirteen years. There was testimony that the Nunnemaker house was a happy family (IV RT 5-10). Though for reasons unknown Mrs. Nunnemaker had stayed out all night with Mickey Brower under the pretense of assisting in moving Mickey Brower.

Petitioner's last recollection of the evening in which Mrs. Nunnemaker stayed out was when she came in at 6:00 A.M. (I RT 165). He did not recall any argument with his wife (I RT 207).

After petitioner was [served] with notice of dissolution proceeding (approximately ten days after the alleged argument about Mrs. Nunnemaker staying out all night with the children) Mr. Nunnemaker attempted to effect a reconciliation, but Mrs. Nunnemaker rebuffed his efforts (I RT 166, IV RT 37).

Mrs. Nunnemaker's efforts to hurt Mr. Nunnemaker emotionally are evidenced by she requesting that he not visit his children in the home but rather in a nearby park stating that she did not want him in her house (I RT 167).

Testimony revealed that petitioner had begun to suffer both physically and emotionally. He had lost weight and became very forgetful (I RT 170, 175; IV RT 13, 21-22, 31, 37-38,42). Wallace feared that Mr. Nunnemaker was on the [verge] of a nervous breakdown

(IV RT 19-20). So is [sic] was established that Mr. Nunnemaker actions and attitude suggested the presence of a prominent psychiatric disorder were detectable.

On the day of May 31, 1975, Mr. Nunnemaker testified that he did not remember carrying a weapon. He went to the family house to deliver a gift for his son. When he got to the house, his wife refused to let him in to see any of his children stating that he should have called first (I RT 181, 225). Mr. Nunnemaker remembers Mickey Brower, who appeared to be maneuvering to get behind him, while at the same time he saw Adrian Turner in the hallway in his general direction (I RT 182). Mr. Nunnemaker also testified that his wife launched herself at him. (I RT 229).

Petitioner's next recollection was that his son Shawn was sitting on his lap. He then went to the car to obtain the gift that he had brought. That was the first time that he noticed he had a gun in his hand. He placed the gun in the car and returned to the house. Upon returning to the house, he noticed that his wife

was lying on the floor. He then telephoned the sheriff's department (I RT 182-83).

At trial petitioner testified that he did not remember drinking that morning, carrying a gun to his family home, shooting his wife, cutting a phone cord or the alleged struggled that was to have taken place in the living room (I RT 178, 183, 223, 225, 231-32). He testified that he loved his wife and did not intend to shoot her. (I RT 183).

Psychiatrist Martin Blinder testified that he examined petitioner on July 24, 1975 and again on January 8, 1976 and subsequently reviewed the files and records relating to the psychiatric condition of petitioner (III RT 402-03). He further testified that the injury to petitioner's back caused him much pain which he attempted to dull with alcohol. As a result, liquor became a crutch (III RT 405). His wife's ultimate rejection and the realization that reconciliation was impossible left petitioner emotionally and mentally devastated (III RT 408). It was adduced at trial that

petitioner suffered a psychotic depression, the symptoms of which include weight loss, insomnia, loss of energy and sexual interest, fatigue, and a slowing of mental processes (III RT 408).

After thirteen years of marriage, three children, four foster children, and a serious back injury, in the spring of 1975, petitioner found himself with no home, no job, no wife and no children. Having given up the drinking, he had no alcoholic crutch on which to lean. (III RT 412).

Doctor Blinder concluded that petitioner's adverse circumstances exacerbated his emotional problem and produced a disassociative reaction on the day he killed his wife. Petitioner's "cognitive, rational, controlling, judgmental, cerebral functions were rendered partially inoperative and subordinate to impulsive, emotional acts" (III RT 419).

Further, Doctor Blinder was of the opinion that the mental disorder from which petitioner suffered affected his ability to deliberate and premeditate (III RT 419-

20). In short, Doctor Blinder testified that it was possible, although not probable that petitioner premeditated the death of his wife (III RT 463).

There was a rebuttal offered by prosecution. A Psychiatrist by the name of Stephen Lowe testified against petitioner.

Dated: May 16, 1986

Respectfully submitted,

Original signed

OWEN (DUANE) NUNNEMAKER
In Pro Per

DECLARATION

Comes now, Owen Duane Nunnemaker, the petitioner in the enclosed Petition for Writ of Habeas Corpus and states under penalty of (perjury) that all of the statements made are true and correct to the best of his knowledge. To those things stated from memory, I believe them to be true and correct.

Further, that I am incarcerated at the California Medical Facility, Vacaville, California. That I am

without funds to employ an attorney, but believe I am entitled to the redress herein sought.

Executed this 16 day of May, 1986 at the California Medical Facility, Vacaville, California.

Original signed
OWEN DUANE NUNNEMAKER

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

In the matter of:

OWEN DUANE NUNNEMAKER,

Petitioner, CASE NO.

ON HABEAS CORPUS.

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, Owen Duane Nunnemaker, hereby petitions this Court for a writ of habeas corpus and by this petition, alleges the following:

I

Petitioner, Owen Duane Nunnemaker, is incarcerated and restrained of his liberty at the California Medical Facility, a California State Prison, located at Vacaville, California. This incarceration is pursuant to a judgment pronounced by the Superior Court, in the county of Sonoma on the 15th day of March 1976. (Case No. 7869-C; Appellate No. 1 Crim. 15379)

II

In an unpublished opinion, filed June 30, 1978, Petitioner's conviction was affirmed in part. The Appellate Court stated as follows:

> "The Superior Court will modify the judgment and abstract of judgment and commitment to state prison, by striking therefrom the punishment imposed pursuant to Penal Code, sections 12022 and 12022.5; so as modified the judgment is affirmed."

Thus, petitioner was held to serve a life sentence for the first degree murder charge.

III

A petition for habeas corpus was filed with the First Appellate District Court and subsequently denied on the 29th day of April 1985. There is no other appeals, petitions or actions pending in this case in any other court.

IV

Petitioner suffers from illegal restraints because he was deprived of his constitutional right to the effective assistance of counsel at the trial level.

Further, petitioner contends that his appellate counsel was also ineffective in that all issues were not presented to the appellate court for consideration.

Petitioner maintains that the evidence is insufficient to support the findings of a first degree murder.

That prosecutional misconduct swayed the jury in favor of the prosecution's case and prejudiced the jury against defendant.

That the testimony of Doctor Lowe was obtained in violation of petitioner's Miranda rights and was illegally used in the trial.

That the issue of "credibility" as well as the "reliability" of the emotionally handicapped children that testified against petitioner.

That the issue of "intent" was not settled nor placed before the jury to establish a first degree murder charge.

That the conviction is in violation of the California felony-murder rule.

That petitioner was held for five days without the benefit of arraignment in violation of Penal Code, section 825.

For all the foregoing reasons, petitioner was denied a fair trial and denied a meritorious defense.

V

The grounds set forth herein have not been previously presented by this petitioner to this or any other court, state or federal, in any petition, motion or application, except insofar as presented in petitioner's direct appeal and in the writ of habeas corpus to the appellate court which was denied.

VI

Petitioner believes the record is sufficient to entitle him to a reversal of his conviction. Petitioner has no other plain, speedy, or adequate remedy at law.

Wherefor, petitioner respectfully requests that this Court:

1) Issue its order to show cause to the Director of the Department of Corrections to inquire into the legality of petitioner's present incarceration;

2) After a full hearing issue the writ vacating the judgment of conviction with instructions to grant petitioner a new trial;

3) Grant petitioner whatever further relief is deemed fair and appropriate and in the interest of justice.

Dated: May 16, 1986

Respectfully submitted

Original Signed
Owen Duane Nunnemaker
In Pro Per

ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

I

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

The Constitutional right to counsel mandates more than a pro forma appearance and mere physical presence in the court room (Powell-vs-Alabama (1932) 287 U.S. 45, 57-58, 77 L.Ed. 158, 53 S.Ct. 55; People-vs-Locklar (1978) 84 Cal.App.3d 224, 229, 148 Cal.Rptr. 322).

Petitioner contends that trial counsel for defendant did not diligently or actively participate in the case preparation (People-vs-Borba (1980) 110 Cal.App.3d 989, 994-997, 168 Cal.Rptr. 305). It is a matter of law that an attorney has specific responsibilities to his client regardless of whether or not he is retained or appointed counsel. It is counsel's duty to investigate carefully and fully all defense issues of fact and law that may be available to the defendant. If his failure to do so results in a withdrawal of a crucial defense, the defendant has

not had the effective assistance to which he is entitled. Since even tactical, as well as strategic determinations of trial counsel must have some rational support founded on reasonable, sound legal principles and fully developed facts (People-vs-Zimmerman (1980) 102 Cal.App.3d 647, 657, 659, 161 Cal.Rptr. 669; People-vs-Cooper (1979) 94 Cal.App.3d 672, 679-683, 156 Cal.Rptr. 646) the actions, or lack of actions on the part of trial counsel denied him to a fair trial. The record will also reflect that counsel failed to investigate the facts in the manner of a diligent and conscientious advocate (People-vs-Mozingo 34 Cal.3d 926, 928; People-vs-Fosselman 33 Cal.3d 572, 189 Cal.Rptr. 855 [Supp. 1983]).

Petitioner asserts that a right to counsel encompasses the right to effective assistance of counsel, which in turn encompasses the right of services of proper investigation. (People-vs-Superior Court 96 Cal.App.3d 936)

Counsel's failure to properly investigate and prepare denied defendant his constitutional right to "effective aid in the preparation and subsequent trial of the case (People-vs-Ibarra (163) 60 Cal.2d 460, 464; People-vs-Alabama (1932) 287 U.S. 45, 71; 77 L.Ed. 158, 172, 53 S.Ct. 55, 84 A.L.R. 527).

In the case at hand, the prosecution's psychiatrist Doctor Lowe, did not advise petitioner of his constitutional rights before interviewing him. Doctor Lowe took advantage of the fact the petitioner was in pain and came in as a medical doctor, not a prosecutional psychiatrist. The statements made by petitioner during the "examination" were used by the psychiatrist in reaching his conclusion that petitioner did premeditate the killing of his wife. Petitioner maintains that as soon as the questions began, he requested that the Doctor identify who sent him and that the interview (as it was later called) lasted approximately five minutes, not an hour plus, as was testified.

No matter what was said in the course of the interview, it was all in violation of petitioner's rights under Miranda, and trial counsel failed to object to their admission. The result was that petitioner's defense of "diminished capacity" was seriously hampered.

When a defendant contends upon appeal that the statements to law enforcement personnel or prosecution's employed assistants, as was done in this case, the appellate court is required to conduct an independent review of the uncontradicted facts presented to the lower court. As the rule is summarized in People-vs-Mc Clary (1977) 20 Cal.3d 218, 227:

> "As a reviewing court it is our duty to examine the uncontradicted facts to determine independently whether the trial court's conclusion of voluntariness was properly found ...
>
> In exercising this function the court recognizes that the burden is on the prosecution to show that a confession was voluntarily given without previous inducement, intimidation or (threat) .... [Citation] Thus in making an independent examination of the record to ascertain whether defendant's statements were voluntary we follow a practice of the United States Supreme

> Court which is both well established .... and currently adhered to .... [Citation]" (People-vs-Sanchez (1969) 70 Cal.2d 562, 571-572 [Citations omitted]; See People-vs-Haydel (1974) 12 Cal.3d 190, 198 [Citation omitted]; People-vs-Randall, supra 1 Cal.3d 948, 954). With respect to conflicting testimony, of course, 'we accept that version of events which is most favorable to the People, to the extent that it is supported by the record.' (Ibid.; accord People-vs-Duck Wong (1976) 18 Cal.3d 178, 187 [Citations omitted]; People-vs-Carr (1972) 8 Cal.3d 287, 296 [Citations omitted].)"

The facts in this case are not simple. There was a man who went to the County Jail as a medical doctor. He was in fact, sent by the prosecution. Petitioner had stated that he did not want to speak to any law enforcement people or their agents about the matter for which he was arrested. It is a matter of record that petitioner had medical problems and was in fact taking several pain medications. He had requested to see a doctor for both medication and examination. Instead, he was sent a psychiatrist, who neither advised petitioner of his rights, nor of his true purpose for being there. Subsequently, the use of anything that petitioner may have said to Doctor Lowe and later used by

prosecution constituted prejudicial error because it was not preceded by a valid Miranda waiver.

Petitioner states that the adjudication of which he has been totally deprived of by the failure of counsel greatly diminished his defense and supports his contention that trial counsel was not a diligent advocate. It is not required that counsel be error free, but [in] the case at hand, the absence of objection denied petitioner an important defense issue. The record cannot be void of some basis for the omission (People-vs-Lanphear (1980) 26 Cal.3d 814.) It is for the foregoing reason and those within the record, petitioner contends that trial counsel failed to perform with reasonable competence.

Further, that such failure prejudiced petitioner to the degree that it is reasonably probable that a determination more favorable to the defendant would have resulted, absent from counsel's failings.

II

THE EVIDENCE IS INSUFFICIENT TO ESTABLISH THAT THE HOMICIDE WAS OF SUCH CRUELTY AND AGGRAVATION AS TO SUSTAIN A FIRST DEGREE MURDER VERDICT OR EVEN TO ESTABLISH MALICE AFORETHOUGHT

In the case of People-vs-Bassett, 69 Cal.2d 122, 70 Cal.Rptr. 193 (1968), the court recognized its task as two-fold: To resolve issues raised by appellant in light of the whole record and to judge whether the evidence of each of the essential elements constituting a higher degree of the crime is such "ponderable legal significance" as to sustain the verdict of the trier of fact. In determining whether the record is sufficient in this respect, the appellate court may give credit to evidence which is reasonable in nature, credible and of solid value (People-vs-Redmond 71 Cal.2d 745 (1969). The prosecution's burden is a heavy one: To justify a criminal conviction, the trier must have reasonably rejected all that undermines confidence (People-vs-Redman, supra).

The only evidence presented by the prosecution to prove that petitioner premeditated the killing of his wife was the testimony of Doctor Lowe. He stated that in his opinion that he felt petitioner was not psychotic (IV RT 102, 142) and that he (Mr. Nunnemaker) acted with premeditation (IV RT 116).

The crime of murder in the first degree is a unique offense which requires the prosecution to prove a very specific pattern of conduct. In order to support a verdict of first degree murder, the evidence must clearly prove beyond a reasonable doubt that petitioner engaged in a "willful, deliberate and premeditated killing" (Penal Code, section 189).

The term "premeditated" as used in Penal Code, section 189 means "to think on and resolve in the mind beforehand (People-vs-Honeycutt (1946) 29 Cal.2d 60).

A homicide which occurs during the course of a violent and spontaneous quarrel can never be first degree murder as a matter of law (People-vs-Bender

(1945) 27 Cal.2d 164; People-vs-Wolff (1964) 61 Cal.2d 795).

When the evidence establishes that a homicide occurred during or immediately following a sudden and heated argument, the element of premeditation is negated since "the expressed requirement for a concurrence of deliberation and premeditation excludes from murder of the first degree those homicides which are the result of mere unconsidered or rash impulse hastily executed (People-vs-Bender, supra at 185).

To support a verdict of first degree murder more is required than a mere "understanding and comprehension of the character of the act" (People-vs-Wolff, supra at 822). As a general rule a homicide committed during the heat of passion can never be murder of the first degree (People-vs-Nero (1971) 19 Cal.App.3d 904.)

The reported decisions of the California Supreme Court and the Court of Appeals demonstrate a bright line of holdings that first degree murders convictions resulting from killing during the course of sudden

quarrels will be reduced from first degree to second degree as a matter of law. (People-vs-Caylor (1968) 259 Cal.App.2d 191; People-vs-Fonville (1973) 35 Cal.App.3d 693; (People-vs-Nero, supra; People-vs-Wolff, supra, People-vs-Bender, supra; People-vs-Anderson (1968) 70 Cal.2d 15; People-vs-Tubby (1949) 34 Cal.2d)

The general rule set in Tubby is as follows:

> "Generally the determination of the degree of the crime is left to the discretion of the jury. But the jury's discretion is not absolute. Since the amendment of Penal Code, section 1181 in 1927 trial courts and reviewing courts are authorized to modify the judgment and fix a lesser degree of the crime ..." (Tubby, supra at 76)

The case at hand provides testimony that when petitioner came to the door of his home, it was with the intent to give his son Shawn a birthday gift. An argument begins at the door of Nunnemaker home and continues into the living room. The testimony adduced at trial states that a struggle took place. In the course of the struggle the weapon was discharged, firing one shot that caused the death of Mrs. Nunnemaker.

Murder is defined by statute in California as "the unlawful killing of a human being, with malice aforethought." (Penal Code, § 187) "Such malice may be expressed or implied. It is expressed when there is manifested a deliberate intention to take away the life of a fellow creature. It is implied when no considerable provocation appears or when circumstances attending the killing show an abandoned and malignant heart." (Penal Code, § 188)

There was no intent to kill when petitioner went to his home. All he wanted was some time with his son, not arguments and certainly not to kill his wife.

"All murder which is perpetrated by means of destructive device or explosive, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any other act punishable under section 288, is murder of the first degree; and all

other kinds of murders are [of] the second degree (Penal Code, § 189).

Petitioner contends that the record will support that the first degree murder conviction is in error. The shooting occurred as the result of an argument and subsequent struggle, not premeditation.

The plain language of the California Penal Code demonstrates that section 189 was intended only to be such a degree-fixing device as established by the (preceding) codes. Section 189 states that all murder committed in the perpetration of one of the enumerated felonies is murder of the first degree. Section 187 specifically defines the term murder; it is an unlawful killing with malice aforethought. While such malice may be imputed by common law felony murder rule (see People-vs-Doyell (1874) 48 Cal. 85, 94; (People-vs-Phillips (1966) 64 Cal.2d 574, 582), section 187 expressly requires that a killing be accompanied by malice before it will be labelled "murdered".

Petitioner had no malice in his mind or heart the day he went to his home. He simply wanted to spend a short time with his son on the day of his son's birthday.

The court originally interpreted Penal Code, section 1105 as placing on the defendant the burden of proving, by a preponderance of the evidence, that he lacked malice (People-vs-Hong Ah Duck (1882) 61 Cal. 387, 396; People-vs-Raten (1883) 63 Cal. 421, 422). The burden diminished into a burden of raising a reasonable doubt as to malice (People-vs-Wells (1938) 10 Cal.2d 610, 622) and then into a burden of production of evidence, with no burden of persuasion (Jackson-vs-Superior Court (1965) 62 Cal.2d 521, 526; People-vs-Loggins (1972) 23 Cal.App.3d 597, 602; People-vs-Kelly (1980) 113 Cal.App.3d 1005, 1012). The court in Kelly observed that the Due Process Clause would prohibit any burden heavier than the mere burden of production of evidence, and that the prosecution is constitutionally required to prove malice and the absence of heat of

passion beyond a reasonable doubt (People-vs-Kelly, supra, 113 Cal.App.3d 1005, 1012, 1013.)

III

PREJUDICIAL MISCONDUCT ON THE PART OF PROSECUTION SERVED TO INFLUENCE THE JURY AGAINST PETITIONER

The record in this case will demonstrate that defense counsel made no objections to the misconduct on the part of prosecution. This can only go to the fact that trial counsel was not a diligent advocate for petitioner. It does not remove the harm that was done, nor the prejudice that was installed in the mind of the jury against petitioner. The objectionable comments can best be viewed in the same manner as stated by the Court in Ozuna:

> "The objectionable testimony was produced in order to strengthen the People's case by generating prejudice in the minds of the jurors. It is our opinion that its use for that purpose was not only serious misconduct but was fraught with such harm to defendant as to be irremediable ..."
>
> (People-vs-Ozuna, supra 213 Cal.2d 338, 342)

The prosecutor's statements and tactic served two objectives both prejudicial to petitioner; (1) Prosecution presented the jury with a counterfeit token of guilt and awareness of guilt by use of the telephone conversation between petitioner and police. Further, prosecution changed the wording of that conversation to fit his case. (2) It used maligning tactics, placing before the jury a divorce case along with the murder trial. The statements made by the prosecutor were an inflammatory characterization of petitioner not support[ed] by fact, nor was it relevant to the case. As the court remarked in Giles-vs-Maryland 386 U.S. 66, 100 (1967):

> "A criminal trial is not a game in which the State's function is to outwit and entrap its quarry. The State's pursuit is justice, not a victim."

The pursuit of justice seem far from the "game" that seemingly took place at the expense of petitioner.

The charge of prosecutional misconduct is a serious one, especially when it is supported by the record. Petitioner contends that prosecution attempted to sway

and persuade the jury by use of deliberately misstating the evidence; by repeated attempts to lead, direct and obtain elicit testimony from witnesses that he instructed (Sherry Thomas, an emotionally disturbed child) in his attempts to instill in the minds of the jury members that petitioner was a drunken, lazy, cruel husband, father and person, who treated his wife like a slave.

This was a "premeditated" course on the part of the prosecutor to influence the jury in their finding of first degree murder. The prosecutor then calls Linda Rivera (also an emotionally disturbed child) to reinforce the image "he" is putting forth. (See People-vs-Purvis 60 Cal.2d 323, 33 Cal.Rptr. 10 [1963])

It is settled that asking questions for answers that have been asked and answered to be inadmissible and improper, or asking questions for the purpose of prejudicing the jury against a defendant manifests "bad faith" on the part of prosecution (People-vs-Dorsey 43 Cal.App.3d 953, 118 Cal.Rptr. 362 (1974).

The court held in People-vs-Grider, supra 13 Cal.App. 703 (1910) that a test can be applied to determine whether prosecution had committed misconduct in asking an improper question of a witness:

> "What was the purpose of prosecution in asking the question. If it was to take an unfair advantage of the defendant by intimating to the jury something that was either not true or capable of being proven in the manner attempted, then it is error. And if the prosecutor knows when he asks the question that an objection to the question should or will be sustained, the error is not corrected because the objection is sustained ..." (at page 712)

Similar misconduct by the State's advocate psychiatrist, Doctor Lowe, cannot be dismissed. During cross-examination, Doctor Lowe volunteered the following:

> "There is evidence that I don't know whether it has been introduced into court or not, into trial, that indicated at one point that he said you know, if she leaves me, I will [kill her]."
> (I RT 117 Emphasis added.)

Petitioner rejects the possibility that prosecutor's and his advocate's misconduct was accidental. A prosecutor is under a duty to guard against inadmissable statements from his witness and guilty of misconduct I

when he is in violation of his duty. (People-vs-Baker 147 Cal.App.2d 319, 324).

IV

ADMISSION OF TESTIMONY OF DOCTOR LOWE WAS IN VIOLATION OF PETITIONER'S RIGHTS UNDER MIRANDA

Petitioner was allegedly interviewed by Doctor Lowe on June 2, 1975 at the Sonoma County jail at the expressed directions and knowledge of the District Attorney. This interview was conducted in violation of the "safeguards" as set forth in Spencer (In re Spencer (1965) 63 Cal.2d 400, 410).

Further, it was held in direct violation of petitioner's Miranda rights (Miranda-vs-Arizona, supra 384 U.S. at page 471 [16 L.Ed.2d at page 721-22]).

It was never clear whether petitioner fully understood the nature of his relationship to Doctor Lowe, nor did Doctor Lowe make clear his involvement in the case or the proceedings of the alleged interview. Petitioner contends that upon Doctor Lowe's arrival at the County Jail, he neither stated that he was a

psychiatrist or an "advocate" with the District Attorney. Nor was petitioner advised that he did not have to talk to Doctor Lowe, or that he had the right to counsel during the interview. Under these circumstances, the prosecution failed to meet its heavy burden of demonstrating petitioner knowingly and intelligently waived his Miranda rights prior to his interview with Doctor Lowe.

The time sequence surrounding petitioner's interview with Doctor Lowe must also be taken into consideration in determining whether the statements that may or may not have been made were voluntarily obtained. Petitioner was taken into custody May 30, 1975. He had stated that he had nothing to say to anyone about anything. He was held without arraignment and on June 2nd, 1975 he (was) taken down for an "interview with a doctor." The one thing that petitioner did request was "medical treatment" as he had been injured in an accident and was in pain.

According to the District Attorney's Office petitioner was supposed to be arraigned the next morning.

When an arrest is made without a warrant, "the person arrested if not otherwise released, shall, without unnecessary delay be taken before the nearest or most accessible magistrate in the county in which the offense is triable, and a complaint stating the charge against the arrested person shall be laid before such magistrate." (Penal Code, § 849, subd. (a), emphasis added.)

In People-vs-Powell (1967) 67 Cal.2d 32, 58-60, this Honorable Court stated that unnecessary delay in arraignment "violates a fundamental right of the arrested person and is in disobedience of the law." (Id. at page 59.) Indeed, "The principal purposes of the requirement of prompt arraignment are to prevent secret police interrogation, to place the issue of probable cause for the arrest before a judicial officer, to provide the defendant with full advice as to his rights and an opportunity to have counsel appointed, and to enable him to apply for bail or habeas corpus when necessary."

(Id., at p. 60, emphasis added.) Police violations of the letter and the spirit of this law are to be "firmly condemned." (People-vs-Pettingill, supra, 21 Cal.3d 231, 243.)

In determining whether a defendant's statement is involuntary, the totality of the circumstances surrounding the statement must be taken into account (People-vs-Haydel (1974) 12 Cal.3d 190, 198; Schneckloth-vs-Bustamonte (1973) 412 U.S. 218, 226 [36 L.Ed.2d 854, 862). Clearly, one of those circumstances in the instant case is the fact that petitioner had not been arraigned at the time of the interview by Doctor Lowe, at the District Attorney's direction.

It needs to be stated that there appears to be no reason why Doctor Lowe could not have waited until petitioner was properly arraigned and counsel appointed before attempting this interview. It was the clear intention of the prosecution to have petitioner arraigned by Doctor Lowe before his arraignment. Such a blatant plan to conduct a secret interview with petitioner prior

to arraignment and in the absence of counsel is the precise harm which is sought to be avoided by a requirement of a prompt arraignment. (People-vs-Powell, supra.)

Therefore, petitioner's statement on June 2, 1975, to Doctor Lowe were made without an effective Miranda advisement and waiver. The weight from this prejudicial error alone compels the vacating of petitioner's present conviction.

V

THE STATEMENTS MADE BY DOCTOR LOWE CONSTITUTE GROSS PREJUDICIAL ERROR

An admission erroneously admitted at trial in violation of Miranda is deemed prejudicial unless the People can show beyond a reasonable doubt that the error complained of did not contribute to the verdict. (People-vs-McClary, supra, 20 Cal.3d 218, 230; Chapman-vs-California (1967) 386 U.S. 18, 23-24.)

In the case now before this Court, Doctor Lowe's testimony as a rebuttal witness for the prosecution,

based upon petitioner's comments made during the June 2nd, 1975 interview, went to the very heart of the defense and compels that the judgment be vacated.

It was stated that the central issue in the case was petitioner's state mentally at the time the acts were committed. Defense counsel argued that there was no question that petitioner shot his wife, but the issue was his mental condition. In response to this defense, the prosecution called Doctor Lowe as a rebuttal witness on the issue of petitioner's mental capacity. Lowe stated that it was his opinion that petitioner was sane at the time of the commission of the alleged offense and further went on to say that petitioner acted with premeditation. Doctor Lowe testified that petitioner suffered no mental disease or defect; showed no signs of being psychotic; and did not have diminished capacity.

In light of the stated mental defense, the verdict of the jury and the nature of Doctor Lowe's rebuttal testimony on behalf of the prosecution, it certainly cannot be said beyond a reasonable doubt that the error

complained of did not contribute to the verdict. Therefore the judgment of conviction must be vacated on all counts. (People-vs-Walker, supra, 29 Cal.App.3d 448, 455-456.)

Justice Jefferson in the Walker case stated the following:

> "Had Doctor Patterson been appointed by the court to examine the defendant, his testimony would not have been admissible under the circumstance of the case. None of the safeguards were employed. There appears to be no justification for allowing inroads on constitutional protections by police psychiatrists that would not be allowed to those appointed to the court." (29 Cal.App.3d at p. 456.)

Walker was examined by the direction of the District Attorney's Officer as was done in the case now before this court. It was not at the direction of a court, no Justice order[ed] the examination and it all was done before the arraignment of petitioner.

As this Court is aware, a violation of the right to counsel occurs when any of the three safeguards under Spencer are breached. The mere breach of the first

safeguard under Spencer deprived petitioner of his right to counsel and requires that the conviction be vacated.

VI

THE ISSUE OF "CREDIBILITY" AS WELL AS THE "RELIABILITY" OF THE EMOTIONAL DISTURBED CHILDREN LEFT UNQUESTIONED CONSTITUTES ERROR

Although the testimony of Sherry Thomas and Linda Rivera had been impeached at the time of trial, the adverse effect on the jury cannot be removed by mere court admonishments. Petitioner contends that the prejudicial effect of these emotional disturbed children on the jury was so that [it] swayed the jury in favor of the prosecutions case in chief.

The court's failure to hold a hearing, out of the presence of the jury constitutes error. In Evidence Code section 780, which states in part:

> "Section (c) The extent of his/her capacity to perceive, to recollect, or to communicate any matter about which he/she testifies.
>
> "(d) The extent of his/her opportunity perceive any matter about which he/she testifies.

"(e) His/her character for honesty or veracity or opposites.

"(f) The existence or nonexistence of a bias, interest, or other motive.

The court had a responsibility to request an examination to determine the capacity of the witnesses, in this case, two (2) emotional disturbed children, for veracity. The prosecution was quick to have petitioner examined, but failed to examine the children.

It is well established fact that emotionally disturbed children are not often truthful. Most are simply unable to determine a truth from a nontruth.

As explained in People-vs-Russell (1968) 69 Cal.2d 187 [70 Cal.Rptr. 216, 443 P.2d], the question before the trial court is "whether, in light of the totality of the circumstances revealed, it is necessary or proper that a psychiatric knowledge in general be utilized in order to aid the trier of facts in the assessment of credibility. (Id., at p. 195.)

In the matter of an emotional disturbed child it would be most difficult without the assistance of a

trained professional to determine the capacity for truthfulness.

It is more than apparent from the testimony that prosecution did in fact "school" both of the emotionally disturbed children and subsequently guided them through the testimony that he wished to obtain from them. It is still a question as to what these two children did or did not see and in fact, witness.

CONCLUSION

Petitioner's delay in the filing of this petition for writ of habeas corpus is attributable to his lack of capacity to represent himself (see In re Saunders (1970) 2 Cal.3d 1033, 1040) and the scarcity of channels through which legal assistance is available to an indigent prisoner.

Further, petitioner is without funds and unable to afford the cost of counsel to handle a petition for writ of habeas corpus.

As set forth in this petition, and through all the records, files briefs and subsequent attachments,

petitioner prays of this court to issue an order to show cause why the herein relief should not be granting.

Further, to issue an order vacating the judgment of conviction and subsequent life sentence imposed by the Sonoma Superior Court.

DATED: May 16, 1986

Respectfully submitted,

Original signed
Owen Duane Nunnemaker
Petitioner In Pro Per

PROOF OF SERVICE BY MAIL

I, Owen Duane Nunnemaker, am the petitioner in the foregoing action. I personally served a true copy of the foregoing "PETITION FOR WRIT OF HABEAS CORPUS" on the party whose name and address is listed below, by placing said true copy, with postage fully paid, within the California Medical Facility Mail Room on the 17th day of May, 1986

California Attorney General's Office
1515 K Street, Suite 511
Sacramento, California 95814

I, Owen Duane Nunnemaker, declare under the penalty of perjury the foregoing is true and correct to my own personal knowledge.

Executed on the 17 day of May 1986 at Vacaville, California.

Original Signed
Owen Duane Nunnemaker

ORDER DENYING WRIT OF HABEAS CORPUS

Criminal No. 25449

IN THE SUPREME COURT OF THE STATE OF CALIFORNI

IN BANK

In re NUMMEMAKER (OWEN DUANE)

on Habeas Corpus.

Petition for writ of habeas corpus DENIED.

(In re Swain (1949) 34 Cal.2d 300, 304; In re Waltreus (1965) 62 Cal.2d 218, 225.)

Original Signed - BIRD
Chief Justice

SUPREME COURT FILED: December 3, 1986
Lawrence P. Gill, Clerk

BEST AVAILABLE COPY

U.S. NORTHERN DISTRICT COURT OF CALIFORNIA
FILED: SEPTEMBER 8, 1987
WILLIAM L. WHITTAKER, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

OWEN DUANE NUNNEMAKER Petitioner, v. EDDIE YLST Respondent.	No. C 87 0409 TEH ORDER

This matter comes before the court on a prisoner's petition for a writ of habeas corpus. Petitioner raises four claims: Ineffective assistance of trial counsel; ineffective assistance of appellate counsel; insufficient evidence to convict of first degree murder; and admission of petitioner's statement in violation of his rights under Miranda.

The petition is not entirely clear as to the procedural history of this matter. Petitioner states that none of his claims were raised by way of direct appeal

in the California courts. However, petitioner did present these and other claims to the California Court of Appeal and Supreme Court by way of a habeas petition. The California Supreme Court denied the petition, citing In Re Waltreus, 62 Cal.2d 218, 225 (1965) and In re Swain, 34 Cal.2d 300, 304 (1949). These citations are cryptic. Walthus holds that arguments rejected on appeal will not be reviewed again in habeas; thus the implications of this citation contradict petitioner's assertion that he did not raise these claims on appeal. Swain, in contrast, holds that habeas claims not pleaded with sufficient particularity must be dismissed without prejudice. This latter citation implies that at least some of petitioner's claims were not presented on appeal, and the California Supreme Court declined to consider their merits on procedural grounds.

As to any claims raised on appeal to the state courts and rejected on the merits, petitioner has exhausted his state remedies on this court can hear his habeas petition. Maxwell v. Summer, 673 F.2d 1031,

1034 (9th Cir. 1982). However, any claims not raised on appeal, and whose merits the state courts have not considered on habeas, must be dismissed for failure to exhaust state remedies, because petitioner has not given the state courts a fair opportunity to consider the merits of these claims. Vasquez v. Hillery, 106 S.Ct. 617, 620-22 (1986). Therefore, those claims which the California Supreme Court dismissed on the basis of Swain have not been exhausted, unless petitioner alleges that it is impossible to plead them with more particularity, and hence that the court's dismissal amounts to a dismissal on the merits. Harris v. Superior Court, 500 F.2d 1124, 1128 (9th Cir. 1974); Kim v. Villalobos, 799 F.2d 1317 (9th Cir. 1986).

Petitioner has several choices. If he can show that he did indeed raise some of his claims on appeal, he may return to this court with those claims. As to claims he did not raise on appeal, his remedy is to file another application for a writ of habeas corpus to the California Supreme Court, pleading his claims with greater

particularity. If this is impossible, he can instead return to this court and allege that the California Supreme Court's dismissal for insufficient particularity amounts to a dismissal on the merits.

Once petitioner determines which of his claims are exhausted and which are not, he again has two choices. He may exhaust all his claims by filing another application for habeas corpus with the state court, or delete his unexhausted claims from his petition and return immediately to this court with only his already exhausted claims. However, under Rose v. Lundy, 455 U.S. 509 (1982), if he later returns to federal court when his other claims have also been exhausted, he runs the risk of having his later petition dismissed as an abuse of the writ of habeas corpus under Rule 9, 28 fol. U.S.C. § 2255, for successive petitions.

Good cause appearing, IT IS HERELY ORDERED that the petition for a writ of habeas corpus is dismissed without prejudice. IT IS FURTHER ORDERED that the Clerk of the Court

shall send a copy of the order to the petitioner by certified mail.

IT IS SO ORDERED.

DATED: September 8, 1987

Original signed
THELTON E. HENDERSON
UNITED STATES DISTRICT JUDGE

U.S. NORTHERN DISTRICT COURT OF CALIFORNIA
FILED: DECEMBER 3, 1987
WILLIAM L. WHITTAKER, CLERK

ENTERED IN CIVIL DOCKET: December 4, 1987

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OWEN DUANE NUNNEMAKER Petitioner, v. EDDIE YLST Respondent.	)	No. C 87 0409 TEH ORDER

This matter comes before the court on a prisoner's petition for a writ of habeas corpus. Petitioner resubmits his habeas petition, following this Court's Order of September 8, 1987 dismissing the original petition without prejudice. However, petitioner has not responded to the procedural problems which caused this Court to dismiss his previous petition.

Since the procedural rules applicable to this petition are complex, this Court will again try to explain why the

first petition was dismissed, and what petitioner must to do allow this Court to reach the merits of his claims.

The problem is that the California Supreme Court's denial of petitioner's state habeas petition is ambiguous. That Court refused to review each of petitioner's claims either because it was raised and rejected on appeal, under In Re Waltreus, 62 Cal.2d 218, 225 (1965) or because it was not pleaded with enough particularity (i.e. with enough factual detail for the court to understand the basis for claim), under In Re Swain, 34 Cal.2d 300, 304 (1949).

Petitioner must tell this Court precisely which claims he raised on appeal, and provide supporting exhibits such as his appellate brief and/or the appellate court's decision. Once this Court is properly informed that a claim has already been raised on appeal to the state court, we can address it in a habeas petition.

If the current habeas petition also includes any claims not raised on appeal--claims which would have been rejected on Swain grounds in the state habeas

proceeding- this Court cannot address such claims, because the state court has not yet had a chance to rule on their merits. So, if petitioner now has any claims that were not raised on appeal, he must: (1) again petition the state court for habeas corpus, pleading these claims with more particularity, or (2) return to this Court and explain why he cannot plead these claims with any more particularity, or (3) delete these claims, and return to this Court with only those claims he raised on appeal.

Accordingly, IT IS HEREBY ORDERED that the petition for a writ of habeas corpus is again dismissed without prejudice. IT IS FURTHER ORDERED that the Clerk of the Court shall send a copy of the order to the petitioner by certified mail.

IT IS SO ORDERED.

DATED: December 3, 1987

Original signed
THELTON E. HENDERSON
UNITED STATES DISTRICT JUDGE

S004531
SUPREME COURT FILED: MARCH 1, 1988
LAURENCE P. GILL, CLERK

Owen Duane Nunnemaker, B-72101
California Medical Facility
P.O. Box 2000
Vacaville, California 95696-2000

In Propria Persona

CALIFORNIA SUPREME COURT

Owen Duane Nunnemaker	No. S004531
Petitioner	Petition for Writ of
vs.	Name of person in custody:
Eddie Ylst, Superintendent California Medical Facility	
Respondent	

_____/

1. Owen Duane Nunnemaker, B-72101 in whose behalf the writ is applied for is confined or restrained of his liberty at California Medical Facility by Eddie Ylst, Superintendent for said Facility

2. Name and location of court under whose process person is confined: Sonoma County Superior Court

3. Nature of the court proceeding (e.g., criminal case, commitment for narcotics addiction, insanity, or mentally disordered or abnormal sex offender) and the case number, if known, resulting in the confinement: Action No. 7869-C, First Degree Murder, violation of Penal Code section 187

4. The date of the judgment, order or decree for confinement and its terms: March 15, 1976 to life imprisonment pursuant to former Penal Code section 1168

5. What plea was entered in the above proceeding (e.g., guilty, not guilty,not guilty by reason of insanity, nolo contendere, etc.)? Not guilty, Not guilty by reasons of diminished capacity

6. Check whether trial or hearing was by:
(a) X a jury
(b) _ a judge without trial

7. Was an appeal taken? Yes

8. If you answered "yes" to (7), list
(a) The name of each court to which an appeal was taken:
i First Appellate District Court of Appeal
ii California Supreme Court

(b) The result in each court:

i Judgment affirmed

ii Petition for hearing denied

(c) The date of each such result and, if known, citations of any written opinions or orders entered:
i People v. Nunnemaker, Unpub. Case No. 1 Crim.
No. 15379-6/30/78
ii Ditto 9/27/78

9. If the answer to (7) was "no," state the reasons for not so appealing: N/A

10. State concisely the grounds on which you base your allegation that the imprisonment or detention is illegal:
(a) Please see pages attached.

11. State concisely and in the same order the facts which support each of the grounds set out in (10):
(a) Please see pages attached

12. Have any other applications, petitions or motions been filed or made in regard to the same detention or restraint? Yes

13. If you answered "yes" to (12), list with respect to each petition, motion or application:
(a) The specific nature thereof:
i Habeas Corpus
ii Habeas Corpus
iii Habeas Corpus
iv Habeas Corpus

(b) The name and location of the court in which each was filed:
i Superior Court of Sonoma County
ii First Appellate District Court of Appeal
iii California Supreme Court
iv US Northern District Court

(c) The disposition thereof:
i Denied summarily
ii California Court of Appeal-First Appellate District
iii California Supreme Court
iv US Northern District Court of California

(d) The date of each such disposition:
i Feb. 25, 1985
ii Unk
iii December 3, 1986
iv September 8, 1987; December 3, 1987 (See Attached Exhibit B & C)

(e) If known, citations of any written opinions or orders entered pursuant to each such disposition:

i In re Nunnemaker # 138158
ii Unk
iii In re Nunnemaker # 25449
iv Civ # 87-0406 TEH; 87-5868 TEH, respectively

14. Has any ground set forth in (10) been previously presented to this or any other court, state or federal, in any petition, motion or application? Yes

15. If you answered "yes" to (14), identify:
(a) Which grounds have been previously presented:
i Same grounds raised herein.

(b) The proceedings in which each ground was raised:
i Habeas Corpus

16. If any ground set forth in (10) has not previously been presented to any court, state or federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) A stated, the issue was previously raised but was denied summarily with the court citing In re Swain, In re Walterus. However, in Pope this Court stated its preference that inadequate counsel be raised on habeas corpus. This was not done before 1986 mainly because I was ill and physically incapacitated with affliction. Only in 1986 was I able to present the issue for the first time and the court cited Swain possibly for my having failed to state reason for the delay.

17. In the proceeding resulting in the confinement complained of, was the representation by an attorney at any time during the course of:
(a) The proceedings prior to trial? Yes
(b) The trial or hearing? Yes
(c) The sentencing or commitment? Yes
(d) An appeal? Yes
(e) The preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction? No

18. If you answered "yes" to one or more parts of (17), list the name and address of each such attorney and the proceeding in which he appeared:
(a) Charles Dresow, Attorney at Law, 899 Ellis St., San Francisco. appeared with petitioner during trial.
(b) Salle S. Solady, 2325 Third St. #423, San Francisco, was counsel on appeal.

19. Is the person in custody represented by an attorney in any matter relating to this confinement? No

If so, state the attorney's name and address:

20. If this petition might lawfully have been made to a lower court, state the circumstances justifying an

application to this court: Petitioner has no otherwise plain or speedy remedy at law for redress of his contentions. This Court has jurisdiction pursuant to Art. VI, section 10 of the California Constitution.

I, the undersigned, say:

I am the petitioner in this action; the above document is true of my own knowledge, except as to matters that are stated in it on my information and belief, and as to those matters I believe it to be true.

Executed on Feb. 29, 1988 at CMF Vacaville, California.

I declare under penalty of perjury that the foregoing is true and correct.

Original Signed
Owen D. Nunnemaker

FAILURE TO OBJECT TO INTRODUCTION OF EXTRAJUDICIAL STATEMENTS OF DEFENDANT OBTAINED IMPROPERLY DURING SURREPTITIOUS INTERROGATION CONDUCTED BY PROSECUTION PSYCHIATRIST DURING WHICH PETITIONER WAS NOT REPRESENTED BY COUNSEL, CONSTITUTES (INEFFECTIVE) TRIAL COUNSEL REPRESENTATION.

Petitioner alleges his statements to prosecution psychiatrist were clearly inadmissible because obtained during surreptitious interrogation during which time petitioner was not afforded an attorney present during the interview. He contends he was deprived of a fair trial as a result of defense counsel's failure to object to the testimony of the prosecution psychiatrist although the California Supreme Court as early as the year 1965 had held such testimony inadmissible unless the defendant had been afforded the presence of counsel during the psychiatrist examination. (In re Spencer (1965) 63 Cal.3d 400, 410). The surreptitious interview complained of in the instant petition was conducted by the prosecution psychiatrist approximately 10 years following the California Supreme Court's holding in Spencer during approximately June, 1975, while

petitioner was being detained in the custody of Sonoma County Jail officials where petitioner had requested to be examined by the jail medical physician in an effort to obtain medical attention for a back injury which was then causing him excruciating pain.

Petitioner was subsequently informed by jail official that a doctor would be notified but was not told that the doctor would be a prosecution psychiatrist. Thus he believed only that the doctor was there to provide medical treatments for his ailing back problems. Petitioner became suspicious after some time during the consultation with the doctor because the questions asked of him tended not to focus upon his medical needs but continued to relate to the crime of which he was charged to which petitioner had made statements of an incriminating nature. By that time petitioner asked and the doctor identified himself as being a prosecution psychiatrist. Whereupon petitioner stated he did not desire to answer anymore questions and the interview was thereupon terminated, but only after the

prosecution psychiatrist had obtained a number of incriminating statements that would later prove to be prejudicial to petitioner's trial defense of diminished capacity. Petitioner's trial commenced on January 13, 1976 and during the course of the trial the prosecution psychiatrist was permitted to testify as to statements that were illegally obtained from petitioner during the June interview with petitioner, without any objection by defense counsel, and petitioner was found guilty of first degree murder. Defense counsel had failed to object although petitioner described for him the circumstances under which the interview took place in the Sonoma County Jail. Defense counsel told petitioner it was done, that there was nothing he could "do about it now." Petitioner himself was unaware of the Spencer decision or he would have complained to the trial court that he was not [receiving] adequate counsel representation. After conviction, petitioner filed timely notice of appeal.

On direct appeal, appellant counsel argued that the prosecution psychiatric testimony of Dr. Lowe was

inadmissible upon the grounds that the statements of petitioner to which the doctor testified had all been obtained in violation of Miranda v. Arizona (1966) 384 US 436 and People v. Bennett (1976) 58 Cal.App.3d 230, 236-237 and fn. 3). The Bennett decision was rendered on May 13, 1976 and established that Miranda principles apply to custodial interrogation of a defendant by a prosecution psychiatrist. In the case at bar, Dr. Lowe had failed to identify himself as a prosecution psychiatrist and failed to apprise petitioner of his rights to counsel present during the interview before conducting the interrogation.

The Court of Appeal in People v. Nunnemaker 1 Crim. No. 15379 (unpub) concluded that the error which occurred in the instant case may not be heard for the first time on direct appeal.

In addition, appellant counsel argued that petitioner had been deprived of a meaningful defense of diminished capacity as a result of trial counsel's failure to timely object to the testimony of Dr. Lowe pertaining

to the improper interview conducted of petitioner while being detained in the custody of the Sonoma County jail officials. To prevail under this line of argument the Court of Appeal concluded no relief is availing unless petitioner's trial record establishes that "counsel was either ignorant of the facts or the law resulting in a withdrawal of a crucial defense 'that reduced the trial to a farce and a sham.'" Absent such affirmative showing, the appellate court concluded that petitioner is entitled to no relief. (page 12 of Exhibit A)

Since the affirmance of petitioner's appeal, the "farce and sham" doctrine was formerly abolished by the California Supreme Court in People v. Pope (1979) 23 Cal.3d 412, 422)

Under the Pope decision, to prevail upon a claim of ineffective trial counsel representation, petitioner must show (1) trial counsel's conduct did not fall below the standard of a reasonably competent attorney; and, (2) that he was prejudiced by counsel's omissions.

Petitioner submits that his trial counsel's failure to move for the suppression of the prosecution's psychiatrist testimony pertaining to petitioner including testimony about the surrepitious interview during which the prosecution's psychiatrist elicited statements of an incriminating nature from petitioner, fell below the standard of reasonably competent attorneys in that the omissions did not result from an informed tactical choice. While deferential scrutiny is generally accorded to counsel's strategic choices, "deference is not abdication." (People v. Ledesma (1987) 43 Cal.3d 171, 217.) Counsel's conduct must in fact be "tactical." It must, that is, involve a decision which contemplated some benefit to defendant. (People v. Nation (1980) 26 Cal.3d 169, 179; People v. Horning (1984) 150 Cal.App.3d 1015, 1022-1023; People v. Dorsey (1975) 46 Cal.App.3d 706, 719) If no plausible tactical explanation can be conceived which would justify the challenged act or omission, then effective assistance of counsel is manifest." (People v. Zimmerman 1980) 102

Cal.App.3d 647, 657; see People v. Robertson (1982) 33 Cal.3d 21, 24; People v. Rodriquez (1977) 73 Cal.App.3d 1023, 1027; People v. Bess (1984) 153 Cal.App.3d 1053, 1059; People v. Dorsey, supra.)

A constitutionally acceptable choice must be an informed one, based on "adequate investigation and preparation . . . . If counsel fails to make such a decision, [The] action, no matter how unobjectionable in the abstract -- is professionally deficient. (People v. Ledesma, supra, 43 Cal.3d at p. 215.) As stated in People v. Pope, supra, 23 Cal. 412, 425-426:

> "[W]here the record shows that counsel has failed to research the law or investigate the facts in the manner of a diligent conscientious advocate, the conviction should be reversed since the defendant has been deprived of adequate assistance of counsel."

(Accord, Strickland v. Washington (1984) 466 U.S. 668, 690-691;[3/] In re Hall (1981) 30 Cal.3d 408, 426; People v. Frierson (1979) 25 Cal.3d 142, 166.)

---

3. (PETITIONER DID NOT INSERT FN. IN ORIGINAL TEXT.)

Although indicative, failure to investigate is not the only predicate upon which a claim of inadequate trial counsel representation may be sustained. In Pope the court adopted the (alternative) test of whether counsel "effectively suppl[ied] to a defendant those skills and legal knowledge which can reasonably be expected from any member of the bar. (Id., 23 Cal.3d at p. 421-424) The Court concluded the standard of reasonable competent representation affords a measurable guide for evaluating the quality of trial counsel's decision-making and held "Defense strategy and tactics which lawyers of ordinary training and skill in criminal law would not (consider) competent deny a criminal defendant the effective assistance of counsel, if some other action would have better protected a defendant and was reasonably foreseeable as such before trial. (Id at p. 424)

The Pope Court explains that "If the failure of a criminal defense counsel to perform his obligations to his client results in the withdrawal of a crucial or

potentially meritorious defense, the defendant has not had the assistance of counsel to which he is constitutionally entitled. A crucial defense is not necessarily one which, if presented, would result inexorably in a defendant's acquittal. (R)ather, explains the Court, by failing to obtain an adjudication of the stronger of two potential defenses, trial counsel deprives his client of constitutionally adequate assistance." (Id. at p. 425) Thus in sustaining his burden of showing that petitioner was rendered constitutionally inadequate trial counsel assistance, he must show:

> (1) That trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates.
>
> (2) That counsel's acts or omissions resulted in the withdrawal of a potentially meritorious defense.

Once a petitioner has met these burdens, the reviewing court must look to see if the record contained an explanation for the challenged aspect of representation. If it does, the court must inquire whether the explanation demonstrates that counsel was reasonably

competent and acting as a conscientious, diligent advocate. When the record shows that counsel has failed to research the law or investigate the facts in a manner of a diligent and conscientious (advocate,) the conviction should be reversed, since the defendant has been deprived of adequate (counsel). However, when the record on review sheds no light on why counsel acted or failed to act in the manner challenged, the case must be affirmed on (appeal) (as was done in the instant case), unless counsel was asked for an explanation and failed to provide one (which was not done in the (instant) case) or unless there simply could be no satisfactory explanation. (People v. Pope, supra, 23 Cal.3d 412, 425; Strickland v. Washington, 466 U.S. 668, 687, 80 L.Ed.2d 674. 693, 104 S.Ct. 2052; People v. Ledesma (1987) 43 Cal.3d 171, 215-217)

In the case at bar the Court of Appeal on direct review attempted a conjured possible explanation for defense counsel's omissions-for failing to move for the exclusion of prosecution psychiatrist's testimony

pertaining to petitioner's extra judicial statements obtained without the presence of counsel and without petitioner being admonished as to the right to counsel during the prosecution-psychiatric examination which was conducted surreptitiously; however, the explanation is so (specious) as to be tantamount to no explanation at all since there would be no need to attack the psychiatrist's credibility if the testimony was barred as a matter of law.

The Pope Court concluded "When the record on appeal of a criminal conviction does not illuminate the basis for the acts or omissions of defense counsel, a claim defense of ineffective assistance is more appropriately made in a petition for habeas corpus. In habeas corpus proceedings, there is an opportunity in an evidentiary hearing to have counsel fully describe his or her reasons for acting or failing to act in the manner complained of. For example, counsel may (explain) why certain defenses were or were not presented. Having afforded the trial attorney an opportunity to explain,

courts are in a position to intelligently evaluate whether counsel's acts or omissions were within the range of reasonable competence. (People v. Pope, supra, at p. 426)

With the above principles in mind, the court must determine whether petitioner received the kind of legal assistance to be expected of a reasonably competent attorney acting as a conscientious, diligent advocate. (People v. Pope, supra, p. 427)

In In re Spencer, supra, 63 Cal.2d 400, observed that "Althought the court-appointed psychiatrist, an agent of the court, does not necessarily seek to elicit incriminating statements for use by the prosecution . . . , he does question a defendant about the facts of the crime, and any incriminating statements of a defendant so procured may be utilized by the prosecution at the guilt trial."

The court concluded the fact that the purpose of the psychiatric interview is not to gather evidence for the prosecution serves to compound the unfairness of

the psychiatrist's testimony; an agent of the court in reality lulls a defendant into making incriminating statements that may be used against him at the guilt trial. The Court held that if the court-appointed psychiatrist's testimony as to petitioner's incriminating statements was to be admissible, petitioner was entitled to the presence of counsel during the psychiatric examination. (In re Spencer 63 Cal.2d at p. 410)

Petitioner's initial burden under Pope is to show that counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates. (Ibid., 23 Cal.3d at p. 425). In the instant case objectionable prosecution (psychiatric) testimony was allowed without any resistance from the defense. In a similar case (People v. Williams (1971) 22 (Cal.App.) 3d 34, 46-47) the Second (Appellate) District Court of Appeal held that the defendant in a homicide prosecution was deprived of adequate legal representation in a crucial stage of his trial, where there was no apparent motive for the killing and the defense

was that of 'totally diminished capacity,' where defense counsel failed to object to hearsay containing an insinuation as to a possible motive, where no motion to strike the testimony was made either at the time it was given or when the district attorney later attempted to use it as the basis for cross-examination of a psychiatrist who had testified favorably to the defense on direct examination, and where counsel again failed to bring the matter to the court's attention when the district attorney indirectly referred to the testimony in argument by suggesting speculation as to motive. The instant case is similar to the Williams Case in that testimony regarding the divorce action initiated by petitioner's deceased wife and that petitioner stood to lose a substantial part of his income as well as access to his children was offered as motive to establish "preexisting (reflection)" offered to establish premeditated murder. The point here, however is petitioner's uncounseled statements obtained surreptitiously by the prosecution psychiatrist was proper matter for exclusion under both In re Spencer, supra;

and People v. Williams, supra, but were not ordered suppressed simply because counsel failed to make the appropriate objection. The Court of Appeal on direct review made a specious effort to conjure a far fetched justification for defense counsel's inaction alluding to the possibility counsel opted to attack the credibility of Dr. Lowe by subjecting him to vigorous cross-examination. This reasoning is marred since the obvious, easiest, swiftest, and most effacious method of dealing with Dr. Lowe would have been to suppress the testimony and be done with it. Such would have been expected of an attorney performing conscientiously as advocate.

Failure of defense counsel to interpose of Spencer objection to the prosecution psychiatrist testimony prejudicially resulted in the withdrawal of a potentially meritorious defense of diminished capacity defense to the same extent found in People v. Williams, supra.

In the instant case, petitioner put on psychiatric evidence indicating that he'd acted without malice. However, this was rebutted by the improper testimony

of Dr. Lowe, the prosecution's psychiatrist who interviewed petitioner without the presence of any defense counsel. Petitioner never waived the right to have defense counsel presence during the interview with Dr. Lowe which was conducted surrepitiously without the presence of counsel for the defense.

ORDER DENYING WRIT OF HABEAS CORPUS

No. S004531

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

IN RE OWEN DWAYNE NUNNEMAKER

ON

HABEAS CORPUS

Petition for writ of habeas corpus DENIED.

Original Signed
Acting Chief Justice

SUPREME COURT FILED: April 7, 1988
Lawrence P. Gill, Clerk

FILED: December 9, 1988
William L. Whittaker
Clerk, U.S. District Court
Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OWEN DUANE NUNNEMAKER Petitioner, v. EDDIE YLST, Respondent.	No. C-88-1828 TEH **ORDER**

This matter comes before the court on petitioner's petition for a writ of habeas corpus. After being convicted of first degree murder, petitioner was confined to the California Medical Facility at Vacaville. Petitioner contends that he is unlawfully confined because 1) statements he made to a prosecution psychiatrist were obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966), and were erroneously admitted at trial, 2) his attorney was incompetent for

failing to object to the introduction of the psychiatrist's testimony, 3) the evidence introduced at trial was insufficient to support a verdict of first degree murder, and 4) the prosecutor's actions constituted prejudicial misconduct. Having reviewed the papers and the record in this case and good cause appearing, the petition is denied for the reasons set forth below.

DISCUSSION

I. Whether this Court is Barred from Reviewing Petitioner's Claim that his Statements to a Prosecution Psychiatrist were Erroneously Admitted.

Under California law, the failure to make a specific and timely objection at trial to the testimony of a prosecution psychiatrist who examined the defendant without admonishing him of his rights under Miranda, bars the issue from later appeal. People v. Bennett, 60 Cal.App.3d 112, 116 (1976). In petitioner's case, defense counsel objected to certain statements made by the prosecution psychiatrist, but failed to raise the issue that the entire testimony was based on an interview which violated petitioner's rights under Miranda and the

fifth and fourteenth amendments. Consequently, this issue was never raised on appeal to the California Court of Appeals or the California Supreme Court.

Federal courts require that a state prisoner exhaust the remedies available in state courts before presenting a habeas corpus claim for federal review. 28 U.S.C. Sections 2254(b),(c); Rose v. Lundy, 455 U.S. 509 (1982); McNeeley v. Arave, 842 F.2d 230, 231 (9th Cir. 1988). The purpose of the exhaustion requirement is to provide the highest state court with a fair opportunity to rule on the merits of each and every issue petitioner seeks to raise in federal court. Granberry v. Greer, 107 S.Ct. 1671, 1675 (1987). Where, because of a procedural default, the state has not been afforded this opportunity, federal courts will hear a claim only if the petitioner can show both cause for the procedural default and actual prejudice. Engle v. Isaac, 456 U.S. 107, 129 (1982), aff'g Wainwright v. Sykes, 433 U.S. 72 (1977). Cause for procedural default will only be found when a "constitutional claim is so novel that its legal

basis is not reasonably available to counsel." Reed v. Ross, 468 U.S. 1 (1984). Where a claim is as well known and frequently litigated as Miranda, counsel's decision not to raise it will only constitute cause for procedural fault if counsel's assistance is found to have been ineffective. Engle, 456 U.S. at 134; Murray v. Carrier, 477 U.S. 477, 492 (1986). As discussed below, this court rejects petitioner's contention that his trial counsel was ineffective.

Thus, in deference to the state courts and the laws of judicial comity, this court is barred from considering petitioner's claim that the statements he made to the prosecution psychiatrist were elicited in violation of Miranda and his fifth and fourteenth amendment rights and were erroneously admitted at trial.

II. Whether Trial Counsel's Failure to Object to the Testimony of the Prosecution Psychiatrist Deprived Petitioner of the Effective Assistance of Counsel.

To prove ineffective assistance of counsel, petitioner must allege that counsel made specific errors so serious that he was not acting as 'counsel' guaranteed by the

sixth amendment and thus, that the proper functioning of the adversarial system and the reliability of the trial were undermined. Strickland v. Washington, 466 U.S. 668 (1984). This court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional conduct. Id. at 668.

Petitioner contends that he was deprived of the effective assistance of counsel because his trial counsel failed to object to the admission of the prosecution psychiatrist's testimony. Petitioner states that defense counsel could have avoided making numerous objections to specific aspects of the prosecution psychiatrist's testimony by objecting to the entire testimony on the grounds that petitioner was not warned that he could remain silent, that any statements made could be used against him or that he had the right to consult an attorney. See Miranda v. Arizona, 384 U.S. 436; see also Estelle v. Smith, 451 U.S. 454, 461-69 (1981) (defendant must be warned that he has a right to remain silent before being questioned by a psychiatrist

and has a right to consult with an attorney about his participation in the exam).

However, the efficacy of counsel's tactics is not an issue for this court. See Bashor v. Risley, 730 F.2d 1228, 1241 (9th Cir. 1984), cert. denied, 469 U.S. 838 (1984); see also United States v. Mayo, 646 F.2d 369, 375 (9th Cir. 1980), cert. denied, 545 U.S. 1127 (1981); see also Jones v. Barnes, 463 U.S. 745 (1983) (defense counsel has no constitutional duty to raise every nonfrivolous issue requested by defendant). Counsel's vigorous objections to specific aspects of the psychiatrist's testimony clearly establish the presence of an adversarial element at petitioner's trial. Defense counsel was clearly acting as the 'counsel' guaranteed petitioner by the sixth amendment.[1/]

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1. Petitioner claims that, under Townsend v. Sain, 372 U.S. 293 (1963), he is entitled to an evidentiary hearing to determine why defense counsel did not move to exclude the prosecution psychiatrist's testimony. Townsend does not stand for such a proposition and such a hearing is not appropriate in this case.

Accordingly, this court finds that petitioner was not denied the effective assistance of counsel.

III. Whether the Evidence set Forth at Trial was Sufficient to Sustain a Conviction of First Degree Murder.

This court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). Murder is the unlawful killing of another with malice aforethought. Cal. Penal Code Section 188 (West's 1988). To sustain a conviction of first degree murder the prosecutor must have presented sufficient evidence so that a reasonable jury might find that the murder was willful, deliberate, and premeditated. Cal. Penal Code Section 189 (West's 1988).

Petitioner contends that the evidence produced at trial does not support a finding that he committed first degree murder. It is unclear whether he claims that a rational jury could not have found that the killing was

done with malice (required for both first and second degree murder) or that a rational jury could not have found that the killing was wilful, deliberate and premeditated (the additional elements required for first degree murder). However, after careful review of the record, this court finds that a rational jury could have reasonably found all of these elements.

Malice may be implied when the killing proximately resulted from an act, the natural consequences of which are dangerous to life, and the act was deliberately performed by a person who acted with conscious disregard for life. People v. Mattison, 4 Cal.3d 177, 182-183 (1971); People v. Phillips, 64 Cal.2d 574, 587 (1966); see also Jackson v. Superior Court of City and County of San Francisco, 62 Cal.2d 521 (1965) (malice may be implied from assault with a dangerous weapon). The words willful, deliberate and premeditated should be construed in their ordinary dictionary meaning. People v. Orabuena, 56 Cal.App.3d 540 (1975). They refer to the mental state of someone who carefully

weighs the course of action he is about to take and chooses to kill the victim after considering the reasons for and against it. People v. Fusselman, 46 Cal.App.3d 289 (1975). The jury may infer premeditation and deliberation from facts about how and what defendant did prior to the actual killing, the defendant's prior relationship and/or conduct with the victim, and the nature of the killing. People v. Anderson, 70 Cal.2d 15, 26-27 (1968).

The prosecution presented ample evidence from which a rational jury could have found malice, and willful, deliberate and premeditated intent to kill. The record showed that petitioner and his wife were estranged at the time of the killing, that petitioner's attempts at reconciliation had failed, and that he had been deprived of the companionship of his children. There was also evidence in the record to indicate that on May 31, 1975, petitioner armed himself with a pistol and extra ammunition, told a friend that he was going to put more notches on his gun, drove to his estranged

wife's home and shot her in the chest. Petitioner claims that he did not intend to shoot her, but that the gun discharged during a struggle. However, two eyewitnesses testified that he shot his wife intentionally, from three feet away. There was also evidence that after the shooting he cut the telephone cord and refused to allow a doctor to be called.

This evidence, along with the other evidence in the record, supports a rational jury's conclusion that petitioner killed his wife with willful, deliberate, premeditated and malicious intent.

IV. Whether this Court is Barred from Reviewing Petitioner's Claims of Prosecutorial Misconduct and Improper Admission of Testimony.

Petitioner contends that the prosecution committed misconduct by misstating the evidence, by inducing witnesses to testify as it wished and by mischaracterizing petitioner. However, petitioner failed to object or request a curative admonition at trial. These steps are required by state law, in order to preserve the grounds

for reversal. People v. Green, 27 Cal.3d 1, 27-36 (1980). As a result of this procedural default, these issues were not raised on appeal to the state courts and, as explained above, in the absence of cause and prejudice for the default, this court is precluded from considering the claim. See Wainwright v. Sykes, 433 U.S. 72 (1977). Here, where petitioner received the effective assistance of counsel, failure to object at trial is not cause for procedural default. Accordingly, this court is barred from considering petitioner's claim.

Petitioner also contends that he was entitled to a hearing on the ability of two allegedly emotionally disturbed witnesses to testify. However, petitioner failed to preserve this issue for further state review when it was not raised on appeal. Once again, petitioner's procedural default is without cause and this court is barred from reviewing his claim by way of federal habeas corpus.

CONCLUSION

In sum, this court is barred by petitioner's procedural default from reviewing petitioner's claims that his Miranda and fifth and fourteenth amendment rights were violated by the admission of the prosecution psychiatrist's testimony at trial. Secondly, defense counsel's failure to object to the admission of the psychiatrist's testimony did not deprive petitioner of the effective assistance of counsel. Thirdly, this court finds that the evidence was sufficient to support a rational jury's conclusion that that petitioner willfully and maliciously killed his wife after premeditation and deliberation. Finally, petitioner's procedural defaults at trial and on appeal respectively, preclude this court from considering his claims that the prosecutor committed misconduct and that the testimony of two witnesses was erroneously admitted.

Accordingly, and good cause appearing, petitioner's petition for habeas corpus is HEREBY DENIED.

IT IS ORDERED.

DATED: December 9, 1988

THELTON E. HENDERSON
UNITED STATES DISTRICT COURT

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Owen Duane Nunnemaker, Petitioner-Appellant, v. Eddie S. Ylst Respondent-Appellee.	) No. 89-15050) D.C. No.) CV 88-1828) TEH)) ORDER AND) AMENDED) OPINION)

Appeal from the United States District Court
for the Northern District of California
Thelton E. Henderson, District Judge, Presiding

Submitted November 17, 1989*/
San Francisco, California

Filed February 21, 1990
Amended May 25, 1990

Before: Jerome Farris, Harry Pregerson and
Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Pregerson

SUMMARY

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*. The panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 34-4 and Fed. R. App. P. 34(a).

HABEAS CORPUS

Affirming in part and reversing in part a judgment of the district court, the court held that a state procedural default bars federal habeas corpus review only if the last state court clearly and expressly states that its judgment rests on a state procedural bar.

Petitioner California State prisoner Owen Nunnemaker appealed the district court's dismissal of his petition for habeas corpus filed under 28 U.S.C. § 2254. A jury convicted Nunnemaker of first degree murder. At trial, defense counsel made specific objections to certain statements made by the state's psychiatrist, but failed to challenge the entire testimony on the grounds that it was based on an interview conducted in violation of Nunnemaker's Fifth and Sixth Amendment rights. On direct appeal, Nunnemaker raised these federal constitutional challenges for the first time. Affirming the conviction, the state appellate court expressly avoided these challenges and held that failure to interpose an objection during trial precluded

consideration on review. The California Supreme Court denied Nunnemaker's petition for hearing without comment or case citation. After Nunnemaker's habeas corpus petitions were denied by the state courts, the district court also denied his habeas petition because it did not make clear that he had exhausted all state remedies. Nunnemaker then filed a second petition for habeas relief in the California Supreme Court, and that petition was denied. The district court denied Nunnemaker's second petition holding that his state procedural default barred review of the Fifth and Sixth Amendment challenges to the psychiatrist's testimony.

[1] Under the Supreme Court's recent decision in *Harris v. Reed*, 109 S.Ct 1038 (1989), a procedural default bars review in federal habeas proceedings only if the last state court ruling on a case states the basis of its decision. Procedural default alone will not bar federal review; the state court's ruling must have been based at least in part on an adequate and independent state procedural rule. [2] In this case, the California

Supreme Court was the last state court to render judgment. From the record before it, the Court could not say that the California Supreme Court's denial of Nunnemaker's final petition, without cause or comment, was based on a procedural default rather than on the underlying merits of Nunnemaker's claims. The rationale and plain language of *Harris* require that where a state supreme court does not plainly state in its summary denial of an original habeas petition that its ruling rests on a state procedural bar, federal review is not precluded.

[3] Because Nunnemaker did show that his trial counsel's performance was not within the range of competence demanded of attorneys in criminal cases, the court affirmed that part of the district court's ruling.

COUNSEL

Juliana Drous, San Francisco, California, for the petitioner-appellant.

Ronald E. Niver, Deputy Attorney General, San Francisco, California, for the respondent-appellee.

ORDER

The opinion is *Nunnemaker v. Ylst*, No. 89-15050, slip op. (9th Cir. Feb. 21 1990), is amended as follows:

Slip op. at 1842, line 12

The sentence beginning with "Here, the California Supreme Court" is deleted and replaced by the following sentence:

Here, the California Supreme Court was the "last state court to render judgment in the case" because Nunnemaker's last filing with that court was an *original habeas petition* raising again his Fifth Amendment challenge to the state psychiatrist's testimony.

Slip op. at 1842, footnote 4

The first sentence in the footnote is deleted. The following sentence is added after the last sentence in the footnote:

Our holding is expressly limited to cases in which the California Supreme Court denies, without comment or case citation, original habeas petitions.

Slip op. at 1843, footnote 5

The original footnote is deleted and replaced by the following footnote:

In *Ellis v. Lynaugh*, 873 F.2d 830, 838 (5th Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 419 (1989), the Fifth Circuit held that, where a state trial court denied habeas relief on state procedural default grounds but the appellate court "denied relief without written order," federal review of the petitioner's claims was barred by the procedural default. It is not clear, however, whether the state appellate court in *Ellis v. Lynaugh* summarily *affirmed* the trial court's denial of habeas relief on petition for review, *see* Tex. Crim. Proc. Code Ann. § 4.04.2 (1987), or denied an *original habeas petition. See* Tex. Crim. Proc. Code Ann. § 4.04.1 (1987); *see also Ellis v. Lynaugh*, 873 F.2d at 838. Because our decision in this case rests on the fact that the California Supreme Court summarily denied Nunnemaker's *original habeas petition*, we express no opinion on the Fifth Circuit's decision in *Ellis v. Lynaugh*.

The panel has voted to deny the petition for rehearing and to reject the suggestion of rehearing en banc. The full court has been advised as to the suggestion of rehearing en banc, and no judge has requested a vote on en banc consideration.

The petition for rehearing is DENIED and the suggestion of rehearing en banc is REJECTED.

OPINION

PREGERSON, Circuit Judge:

Owen Duane Nunnemaker, a California state prisoner, appeals the district court's dismissal of his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. A California jury convicted Nunnemaker of first degree murder under Cal. Penal Code § 187. At trial, a psychiatrist called by the state prosecutor gave testimony on statements made by Nunnemaker in a post-arrest interview. Nunnemaker contends that the admission of the psychiatrist's testimony violated his Fifth and Sixth Amendment rights, that his Fifth and

Sixth Amendment claims are not barred by procedural default, and that he received ineffective assistance of counsel. In light of the Supreme Court's recent decision in *Harris v. Reed*, ___ U.S. ___, 109 S.Ct. 1038 (1989), decided after the district court ruled on Nunnemaker's petition, we reverse in part and remand the case to the district court for consideration of Nunnemaker's Fifth and Sixth Amendment challenges to his conviction. We affirm the district court's judgment that Nunnemaker was not deprived to effective assistance of counsel.

BACKGROUND

On January 30, 1976, Owen Duane Nunnemaker was convicted in California state court of first degree murder. He was sentenced to life in prison.

At trial, Nunnemaker introduced expert testimony to establish capacity defense then available under California law. To rebut this testimony the state prosecutor called as a witness a psychiatrist who interviewed Nunnemaker two days after his arrest. At the time of the interview, Nunnemaker was told that the

psychiatrist was working for the prosecution. Nunnemaker, however, was not informed that he had the right to remain silent and the right to an attorney. At trial, defense counsel made several specific objections to certain statements made by the state's psychiatrist, but failed to challenge the entire testimony on the grounds that it was based on an interview conducted in violation of Nunnemaker's Fifth and Sixth Amendment rights.

On direct appeal to the California Court of Appeal, Nunnemaker raised for the first time his federal constitutional challenges to the testimony of the state's psychiatrist. Affirming the conviction, the state appellate court expressly avoided these challenges and held that "the failure to interpose an objection during trial preclude[d its] consideration on review." The state appellate court, however, considered on the merits -- and rejected -- Nunnemaker's ineffective assistance of counsel claim. On direct appeal, the California Supreme Court denied Nunnemaker's petition for

hearing, without comment or case citation, on September 27, 1978.

Nunnemaker petitioned the California courts for a writ of habeas corpus. In his habeas petitions, he raised, among other claims, his federal constitutional challenges to the testimony of the state psychiatrist and his ineffective assistance of counsel claim. His petitions were denied.[1/]

Nunnemaker then filed a habeas petition under 28 U.S.C. § 2254 in the United States District Court for the Northern District of California. The district court dismissed the petition without prejudice because the petition did not make clear whether all state remedies had been exhausted.[2/] Nunnemaker filed a second

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1. The Sonoma County Superior Court denied Nunnemaker's petition on February 25, 1985. The California Court of Appeal for the First Circuit denied his petition in late 1985. The California Supreme Court denied his first petition on December 3, 1986, and his second petition on April 7, 1988.

2. The district court stated:

> The petition is not entirely clear as to the procedural history of this matter. Petitioner

petition for habeas relief in the California Supreme Court, arguing again that his statements to the state

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states that none of his claims were raised by way of direct appeal in the California courts. However, petitioner did present these and other claims to the California Court of Appeal and Supreme Court by way of a habeas petition. The California Supreme Court denied the petition, citing *In Re Waltreus,* 62 Cal.2d 218, 225 (1965) and *In Re Swain*, 34 Cal.2d 300, 304 (1949). These citations are cryptic. *Walthus* holds that arguments rejected on appeal will not be reviewed again in habeas; thus the implications of this citation contradict petitioner's assertion that he did not raise the claims on appeal. *Swain,* in contrast, holds that habeas claims not pleaded with sufficient particularity must be dismissed without prejudice. This latter citation implies that at least some of petitioner's claims were not presented on appeal, and the California Supreme Court declined to consider their merits on procedural grounds. As to any claims raised on appeal to the state and rejected on the merits, petitioner has exhausted his state remedies and this court can hear his habeas petition.... However, any claims not raised on appeal, and whose merits the state courts have not considered on habeas, must be dismissed....

District Court Ordered, September 8, 1987, at 2.

prosecution psychiatrist were "clearly inadmissible," and stating in greater particularity his claim of ineffective assistance of counsel. That petition was also denied, without comment or case citation, by the California Supreme Court on April 7, 1988.

Nunnemaker filed another federal habeas petition. The district court issued an Order to Show Cause on July 8, 1988. On December 9, 1988, the district court denied the petition. The court held that Nunnemaker's state procedural default barred review of the Fifth and Sixth Amendment challenges to the prosecution's psychiatrist testimony, and that Nunnemaker had not been deprived of effective assistance of counsel.

Nunnemaker filed a timely notice of appeal. This court has jurisdiction over the district court's final order under 28 U.S.C. § 2253.

STANDARD OF REVIEW

We review the district court's denial of habeas corpus relief de novo. *McKenzie v. Risley*, 842 F.2d 1525, 1531 (9th Cir.) (en banc), *cert. denied*, 109 S.Ct.

250 (1988). The question whether Nunnemaker was deprived of effective assistance of counsel is a mixed question of fact and law reviewed de novo. *Strickland v. Washington*, 466 U.S. 668, 698 (1984); *Deutscher v. Whitley*, 884 F.2d 1152, 1155 (9th Cir. 1989).

DISCUSSION

I. Procedural Bar

This case presents the issue whether the California Supreme Court's denial of an original petition for writ of habeas corpus without comment or case citation constitutes a "plain statement" sufficient to establish the procedural default bar of federal habeas review under the Supreme Court's recent decision in *Harris v. Reed*, 109 S.Ct. 1038. We hold that it does not.

The Supreme Court has held that a state prisoner barred by procedural default from raising a federal constitutional claim in state court "could not litigate that claim in a § 2254 habeas corpus proceeding without showing cause for and actual prejudice from the default." *Engle v. Isaac*, 456 U.S. 107, 110 (1982) (citing

Wainwright v. Sykes, 433 U.S. 72 (1977)). In *Harris v. Reed*, the Supreme Court applied this rule, but held that "a federal claimant's [state] procedural default precludes federal habeas review . . . only if the *last* state court rendering a judgment in the case rests its judgment on the procedural default." 109 S.Ct. at 1043 (emphasis added.) The Court explained that *Wainwright v. Sykes'* holding that a state procedural default may bar federal habeas review is based on the adequate and independent state ground doctrine, under which the Court "will not consider an issue of federal law on direct review from a judgment of a state court if that judgment rests on a state-law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision." *Id.* at 1042 (citing *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Murdock v. City of Memphis*, 20 Wall. 590, 635-36 (1875)). The Court in *Harris* applied the "'plain statement' rule" of *Michigan v. Long*, 436 U.S. 1032, 1042 and n.7, to state prisoner cases on federal habeas review, and held that

"a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar." *Harris v. Reed,* 109 S.Ct. at 1043 (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985)).

[1] Under *Harris*, then, a procedural default bars review in federal habeas proceedings only if the last state court ruling on a case states the basis of its decision. Procedural default alone does not bar federal review; the state court's ruling must have been *based,* at least in part, on an "adequate and independent" state procedural rule. *Harris v. Reed,* 109 S.Ct. at 1042. *Harris* undertakes to resolve the problem -- often faced by district courts -- of discerning from an ambiguous state court ruling the basis of a decision to deny habeas relief to a state prisoner raising federal constitutional claims. The plain statement requirement ensures that federal courts will decline to review state prisoners'

federal constitutional claims only where required by the interests of comity.[3]

[2] Here, the California Supreme Court was the "last state court to render judgment in the case" because Nunnemaker's last filing with that court was an *original habeas petition* raising again his Fifth Amendment challenge to the state psychiatrist's testimony.[4] That

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3. Where comity does not require it, federal courts should not deny review. "[T]he federal courts . . . have a primary obligation to protect the rights of the individual that are embodied in the Federal Constitution." *Harris v. Reed*, 109 S.Ct. at 1045 (Stevens, J., concurring).

4. Under California law, a state prisoner seeking collateral review of his or her conviction may file separate, independent habeas petitions in the superior court, court of appeal, and supreme court. Cal. Penal Code § 1475. In addition, however, a state prisoner whose habeas petition is denied in the court of appeal may file a petition for review of that denial in the California Supreme Court. Cal. Penal Code § 1506. In *McQuown v. McCartney*, 795 F.2d 807, 809-10 (9th Cir. 1986), we held that when a habeas case is before the California Supreme Court on a *petition for hearing,* rather than as an *original habeas petition*, a summary denial by the state supreme court is not a decision on the merits of the petition. *See also Tacho v. Martinez*, 862 F.2d 1376, 1378-80 (9th Cir. 1988) (applying *McQuown* and holding that the Arizona Supreme Court's *denial of review* of a trial court denial of habeas relief without case citation or

court did not clearly and expressly state its reliance on Nunnemaker's procedural default when it denied his final habeas petition. The petition raised Nunnemaker's objection to the testimony of the state's psychiatrist and Nunnemaker's ineffective assistance of counsel claim. From the record before us, we cannot say that the California Supreme Court's denial of Nunnemaker's final petition, without comment or case citation, was based on

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comment was not a decision on the merits.) *Cf. Thompson v. Procunier*, 539 F.2d 26, 28 (9th Cir. 1976) ("Where a petition for a writ of habeas corpus presenting a federal constitutional question is denied by a state court with no reason given, we will assume that the state court has had an opportunity to pass upon the merits of the issue and has resolved it against the petitioner.").

McQuown does not affect the present case, because the California Supreme Court denied Nunnemaker's *original habeas petition* on April 7, 1988. That ruling was a "judgment" under *Harris*, and was the last rendered by a state court in Nunnemaker's case. We do not now address the question whether, in light of *Harris v. Reed*, the California Supreme Court's summary denial of a *petition for hearing* on a denial of habeas relief based on a procedural rule bars federal habeas review. Our holding is expressly limited to cases in which the California Supreme Court denies, without comment or case citation, original habeas petitions.

a procedural default rather than on the underlying merits of Nunnemaker's claims. The rationale and plain language of *Harris*, require that, where, as here, a state supreme court does not plainly state in its summary denial of an original habeas petition that its ruling rests on a state procedural bar, federal habeas review is not precluded.[5]

In fact, the Supreme Court discussed in *Harris* the issue now before us. The Court addressed concerns raised over the burden the plain statement requirement

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5. In *Ellis v. Lynaugh*, 873 F.2d 830, 838 (5th Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 419 (1989), the Fifth Circuit held that, where a state trial court denied habeas relief on state procedural default grounds but the appellate court "denied relief without written order," federal review of the petitioner's claims was barred by the procedural default. It is not clear, however, whether the state appellate court in *Ellis v. Lynaugh* summarily *affirmed* the trial court's denial of habeas relief on petition for review, *see* Tex. Crim. Proc. Code Ann. § 4.04.2 (1987), or denied an *original habeas petition*. *See* Tex. Crim. Code Ann. § 4.04.1 (1987); *see also Ellis v. Lynaugh*, 873 F.2d at 838. Because our decision in this case rests on the fact that the California Supreme Court summarily denied Nunnemaker's *original habeas petition*, we express no opinion on the Fifth Circuit's decision in *Ellis v. Lynaugh*.

would place on state courts ruling on habeas petitions. The Court stated that "a state court that wishes to rely on a procedural bar rule in a one-line *pro forma* order easily can write that 'relief is denied for reasons of a procedural default.'" *Harris v. Reed,* 109 S.Ct. at 1044 n.12. The California Supreme Court did not do that in this case.

The district court carefully reviewed Nunnemaker's habeas petitions, but did not have the benefit of the Supreme Court's later clarification of federal habeas law in *Harris*. We hold that the district court was not barred from reviewing Nunnemaker's federal constitutional claims concerning the testimony of the state's psychiatrist.

II. Ineffective Assistance of Counsel

Nunnemaker also contends that he was deprived of effective assistance of counsel, and that federal habeas relief should be granted for that reason.[6] This Sixth

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6. Nunnemaker raised this claim on direct appeal in the state court proceedings, and the state appellate court decided the merits of the claim. The state has made no

Amendment ineffective assistance of counsel claim is based on Nunnemaker's trial counsel's failure to object to the admission of the state psychiatrist's testimony on Fifth and Sixth Amendment grounds. The district court concluded that "[d]efense counsel was clearly acting as the 'counsel' guaranteed by the Sixth Amendment." We agree.

An ineffective assistance of counsel claim has two components:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

Strickland v. Washington, 466 U.S. 668, 687 (1984). A convicted defendant complaining of the ineffectiveness of counsel's assistance must show that counsel's

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argument that this claim was not properly before the district court. The district court correctly reached the ineffective assistance claim in the its review of Nunnemaker's habeas petition.

representation "fell below an objective standard of reasonableness." *Id.* at 688.

The trial record demonstrates that Nunnemaker's counsel vigorously objected to parts of the psychiatrist's testimony on various grounds. Further, because the state's psychiatrist was subject to potentially damaging cross examination, trial counsel's decision to allow the testimony, make specific objections, and impeach the witness on bias and credibility grounds may well have been a sound trial tactic.[7]

[3] Nunnemaker has not shown that his trial counsel's performance "was not 'within the range of competence demanded of attorneys in criminal cases.'" *Id.* at 687 (quoting *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970)).

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7. This was the conclusion reached by the state appellate court on direct appeal.

CONCLUSION

For these reasons, the judgment of the district court is AFFIRMED in part and REVERSED and REMANDED in part.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

November 5, 1990

Re: 90-68 - Eddie S. Ylst, Warden v. Owen Duane Nunnemaker

The court today entered the following order in the above stated case:

"The motion of respondent for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted."